88-1407

Supreme Court, U.S.
FILED
FEB 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

ORAL ARGUMENT REQUESTED

IN THE

Supreme Court of the United States

No. A-553

BERNARD J. DOLENZ,

Appellant,

V.

STUART YACHT BUILDERS, INC.,

Appellee.

PETITION FOR CERTIORARI

Bernard J. Dolenz
6102 Swiss Avenue
Dallas, Texas 75214

Pro Se

PREFACE

A Petition for Writ of Mandamus or a Writ of Prohibition was docketed in this Court on May 2, 1988 as No. 88-971. No ruling has been rendered. Associate Justice Byron R. White gave an Order Extending Time to File a Petition for Writ of Certiorari to February 26, 1989, dated January 11, 19[illegible].

QUESTIONS PRESENTED

I. THE TRIAL COURT LACKS JURISDICTION AND THE CASE SHOULD BE DISMISSED.

II. THE TRIAL COURT ERRED IN ALLOWING THE DEFENDANT ARIES STAR TREK TO BE WITHOUT COUNSEL BY DISMISSING COUNSEL AND REFUSING TO CONTINUE THE CASE, PLACING THE DEFENDANT VESSEL IN A DEFAULT POSITION.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION TO EXTEND TIME TO APPEAL.

IV. THE APPEALS COURT ERRED AS IT HAD JURISDICTION, EVEN THOUGH THE TRIAL COURT DENIED THE MOTION FOR EXTENTION TO APPEAL.

V. THE APPEALS COURT ERRED IN HOLDING THAT THE NOTICE OF THE APPEAL WAS UNTIMELY AS THERE WERE CIRCUMSTANCES THAT PREVENTED THE TIMELY APPEAL UNDER THE CIRCUMSTANCES.

VI.THE TRIAL COURT ABUSED ITS DISCRETION IN NOT RELEASING THE DEFENDANT AIRES STAR TREK AS FUNDS HAVE BEEN TENDERED TO THE COURT FOR ITS RELEASE.

TABLE OF AUTHORITIES

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LIST OF PARTIES

The parties to the proceedings below was the unfinished vessel "Aries Star Trek", enrollment No. 555798 as Defendant, and Stuart Yacht Builders, Inc. was the Plaintiff. This was an in rem proceeding. Melissa Keyes was part owner in the vessel and transferred all of her interests to Bernard Dolenz. The Court and counsel for Stuart Yacht Builders, Ins. knew on March 16, 1987 through sworn testimony that Bernard Dolenz was the owner of the vessel, and yet the Court refused Bernard Dolenz, as owner, the right to defend the vessel, and failed to send notices of activity regarding the defendant vessel, even though repeatedly requested to do so. The Court has never allowed even a hearing before the Court, even though repeatedly requested.

OPINIONS BELOW

This unfinished vessel was arrested on July 10, 1986, and was tried on March 16, 1987 in a default posture. The Court had allowed the vessel's attorney to withdraw from the case on the morning of trial, refusing a Continuance, even though the Court a couple of days earlier had denied the Defendant's counsel his Motion to Withdraw as counsel for the Defendant.

Jurisdiction was challenged by Bernard Dolenz on March 18, 1987 when the Court refused to return his phone calls on March 16, 1987 when the Defendant's attorney abandoned the representation of the vessel. Eventually, after many Motions were before the Court, the Court denied Dolenz's Motion to Dismiss for Lack of Jurisdiction, for Intervention,

and for Reconsideration on September 25, 1987.

A Mandamus action was initiated to the Eleventh Circuit primarily regarding the jurisdictional issue and the Eleventh Circuit denied the Petition for the Writ and denied its Rehearing January 27, 1988.

When the Mandamus action failed, the Trial Court entered a final judgment February 16, 1988 with the Clerk not circulating that notice of judgment to Bernard Dolenz. Dolenz had made many phone calls to the Clerk, and had made many trips regarding the file, and had assurances from the Clerk because of his almost seeming nuisance behavior that he would be kept informed of any activity by the Clerk.

Upon inquiry, Dolenz was shocked to learn that a Judgment had been entered February 16, 1988, and filed papers to vacate that judgment on April 11, 1988, and filed a Motion to Extend Time to Appeal, which was denied by the Court April 22, 1988. An appeal was made to the Eleventh Circuit regarding the District Court's abuse of discretion in not granting the extention of time for a timely appeal because of the circumstances of receiving no notice and other factors for excuseable neglect. The Eleventh Circuit denied jurisdiction of the case even on rehearing September 29, 1988.

It is from the unnoticed judgment, the denial of a Writ of Mandamus and a Writ of Prohibition and the denial of a full appeal to the Eleventh Circuit that the owner of the Defendant vessel is appealing and trying to perfect his Writ of Certiorari.

JURISDICTION

This Court has jurisdiction pursuant to 28 USCA Section 1254.

The Plaintiff came to the Admiralty in the District Court for the Southern District of Florida pursuant to 28 USC Section 1333 and 46 USC Section 971. The owner contends that the Plaintiff invoked the jurisdiction improperly as the vessel was never finished, commissioned, and was still under construction.

The decrees to be reviewed include the Order of the District Court denying the Motion to Dismiss for Lack of Jurisdiction, for Intervention, for Reconsideration on September 25, 1987; the Eleventh Circuit decision Denying Motion for Rehearing on Petition for Writ of Prohibition and/or Writ of Mandamus on

January 27, 1988; the Judgment rendered by the District Court on February 16, 1988; the Order of the District Court Denying Petitioner's Motion to Substitute Parties and Motion to Extend Time to Appeal on April 22, 1988; and the Decision of the Eleventh Circuit Denying the Motion for Rehearing regarding perfecting the appeal on September 29, 1988.

Associate Justice Byron R. White gave an Order Extending Time to File a Petition for Writ of Certiorari to February 26, 1989, dated January 11, 1989

The Appellant herein seeks to invoke the jurisdiction of this Court pursuant to 28 USC Section 1651(a) for the review of some or all of the above stated orders and decisions.

STATUTES INVOLVED

28 U.S.C. §1333.Admiralty, Maritime and Prize Cases

> The district court shall have original jurisdiction, exclusive of the courts of the states, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

46 U.S.C. §971. Persons entitled to lien

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

The Appellant contends these Statutes relied upon by Appellee do not apply as the Defendant vessel was never finished, was under construction, and was never finished.

See Appendix 101 - 107.

STATEMENT OF CASE

The Defendant Aries Star Trek had its wood infrastructure built in Tai Pai in 1968, being freightered to this country to have it finished. The boat owner died, and it remained in an estate for many years being moored in a river. It was hauled from the river after many years to have it finished and commissioned. Stuart Yacht Builders, Inc. dry-docked the vessel, and when work was not done satisfactorily and with exorbitant charges, the Plaintiff sued in Admiralty in rem. The vessel was arrested July 10, 1986 with a notation "... vessel is incomplete, under constuction, and empty of equipment".

Because of a threat, the Plaintiff's owner (Greg Burdick) imputed this unsubstantiated and purported threat to

the owners of the vessel. This alarmed the attorney who was hired to defend the vessel to where he wanted to withdraw as counsel for the Defendant, which was denied March 12, 1987. On March 16, 1987, the attorney was granted his Motion to Withdraw as Counsel and a desire to continue the case was denied placing the vessel in a default posture. Melissa Keyes represented to the Court that Bernard Dolenz had an ownership interest in the vessel prior to March 16, 1987, and indicated that she had transferred her remaining interest to Bernard Dolenz, although such interest had not been formally delivered to Dolenz. The Court would not allow a continuance, and refused to return calls from Dolenz on March 16, 1987 when counsel for the Aries Star Trek had abandoned its defense.

Subsequently, Dolenz filed notices on

Intervention, his claim of ownership to the vessel, and his Motion to Dismiss for Lack of Jurisdiction. The Court remained insensitive to these Motions for over six (6) months, and then denied the Motions to Dismiss for Lack of Jurisdiction, for Intervention, and for Reconsideration on September 25, 1987.

A Petition for Writ of Prohibition and/or Writ of Mandamus was taken to the Eleventh Circuit, which was denied at rehearing on January 27, 1988. The Trial Court then entered a Final Judgment on February 16, 1988. The Clerk did not send a copy of this to Bernard Dolenz, even though the Court knew that he was the owner through testimony and documentation. The Clerk had assured Dolenz that she would keep him posted following several phone calls and trips regarding this case. Inquiry on April 6,

1988 revealed that a judgment had been entered. A Motion to Extend Time for Appeal was sent April 7, 1988 pursuant to FRAP 4(a) and case law dealing with Rule 77(d) and 60(b) before the 60 days would run. A Notice to Appeal was filed April 14, 1988. The Trial Court judge denied the Motion to Extend Time to Appeal on April 22, 1988.

Dolenz filed a Notice of Appeal with the Eleventh Circuit, which was dismissed for lack of jurisdiction because the notice was untimely filed, and a rehearing was denied on September 29, 1988. Dolenz contends that he complied with the Eleventh Circuit's case, TESSMER V. WALKER 833 F2d 935, as he did everything reasonable under the circumstances to be kept informed of the case short of groveling and living at the Ft. Lauderdale Federal Courthouse. The Clerk

indicated that she would keep Dolenz posted as he had made a nuisance by making several phone calls and visits to review the file.

Judge Zloch would never give a hearing throughout all of this paperwork to Dolenz; he even denied a Motion for Hearing.

A check for $45,995.78 was tendered to the Clerk to have the vessel released June 30, 1988 pursuant to Rule 4 (4)(f). Earlier repeated requests for the judgment payoff amounts from Clerk and U.S. Marshall remained unanswered.

Because repeated calls to the Clerk regarding the release of the vessel since money had been tendered and calls to Judge Zloch's chambers resultd in no action or order, a FRAP 8 Motion was

requested of the Eleventh Circuit on July 14, 1988. To date, neither Judge Zloch nor the Eleventh Circuit will give a release of the vessel; nor can I obtain information for its release. In the meantime, the vessel is deteriorating, which had been called to the Zloch Court and Eleventh Circuit's attention on several occasions. Neither Court have given rulings even though requested.

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT LACKS JURISDICTION AND THE CASE SHOULD BE DISMISSED

Lack of jurisdiction is plain, and it is indeed strange that with this evidence, the Zloch Court gave Findings that were contrary to these facts:

(1) The U. S. Marshall upon arresting the vessel 7/10/86 stated: "...Vessel is incomplete, under construction, and empty of equipment..." P-49, Appendix.

(2) Ray Seese, Plaintiff's expert and Marine surveyer states that the vessel has never been completely finished or commissioned... P-42, Appendix.

(3) Statements of Burdick in a local newspaper article that the Boat is about 70% completed. P-43, Appendix.

These facts were pointed out to the Court with Motions to dismiss because of plain lack of an underpinning for a maritime

contract March 18, April 4, April 18, and April 9, 1988. This makes one wonder who authored the judgment.

The boat was never launched. The infrastructure was built in Taipei in 1968 and freightered to this country, with the intent to finish it here. The owner died, with the unfinished boat being moored in a river for over a dozen years while in an estate. The boat was moved to Stuart Yacht for work to begin its completion and launching. P-43, Appendix.

A boat that has never been completely finished or commissioned, as Ray Seese points out in his survey, lacks Admiralty jurisdiction. See Memorandum of Law, P-101 et seq.

II. THE ZLOCH COURT ERRED IN ALLOWING THE DEFENDANT ARIES STAR TREK TO BE WITHOUT COUNSEL BY DISMISSING COUNSEL AND

REFUSING TO CONTINUE THE CASE, PLACING THE DEFENDANT VESSEL IN A DEFAULT POSITIION.

When the boat was arrested, Attorney Lyman Reynolds was hired to defend the vessel. Melissa Keyes told the Court that Bernard Dolenz was a partner with her in the boat, had an interest in it while Lyman Reynolds was defending the vessel. (Appendix P-77). Reynolds tried to withdraw as counsel upon learning that Burdick received a unsubstantiated purported threat, which Burdick was imputing to the vessel. In docket P-1, Motion to withdraw as counsel and Motion to continue were both denied March 12. On the 16th, the Court allowed Reynolds to withdraw as counsel, and refused to continue the case or even a suggestion to continue (P-1, docket).

Several phone calls were placed to Judge

Zloch that morning by Bernard Dolenz (Affidavit of Bernard Dolenz attached to Motion to Dismiss; Motion to Reconsider March 18, 1987; P-10 Appendix; Affidavit, P-93), Why the Court refused to return phone calls to Dolenz and with Lyman Reynolds being allowed to abandon a case for which he was hired without a continuance seems abhorant to any system of justice, particularly when communications were made to the Court. Contrary to the statement on P-89 by the Court, there was contact with the Judge's clerk about wanting a continance and a conversation with the judge. This request was not honored. Melissa Keyes, not being an attorney, told the Court that Dolenz was trying to call you (Zloch) this morning (P-79), was in Court in Texas (P-79), and was hoping for a continuance so that he could properly prepare the case (P-82) because Reynolds

wanted to abandon the case, and did. From an interest standpoint, the Court knew Dolenz had part interest several months earlier, and Reynolds was denied his motion to withdraw as counsel a couple days earlier. Reynolds was hired to represent the Aries Star Trek, the Defendant. When Melissa Keyes asssigned the remaining interest in the boat, giving full ownership to Dolenz, what difference did this make on defending the vessel? Furthermore, Melissa Keyes still had title to her remaining interest until such time as the assignment was DELIVERED. She had standing to continue, and Mr. Perry misrepresented to the Court that she lacked standing (P-83). The Court should either have allowed Mr. Reynolds to defend the vessel with the purported threat that Mr. Burdick alleged, or continue the case so that the defendant vessel could get substitute

counsel.

The issue of Assignments is covered on P-101.

In VILLEGAS V. CARTER, 711 SW2d 624 (Tex 1986) the trial court abused its discretion in denying a motion to continuance after allowing the attorney to voluntarily withdraw two days before trial where the client was not negligenet or at fault in causing his attorney's withdrawal, the client had too short a time in which to find a new attorney and to have that attorney investigate the case and prepare for trial.

Similarly a trial court abused its discretion by denying continuance, and client was prejudiced thereby, where client had little or no advance notice that her counsel would withdraw on morning of trial of a complex matter. MILLS V MILLS, 232 Va 94, 348 SE2d 250, 3 VLR 549. Most jurisdictions have similar

case law. 17 Am. Jur 2d 130.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION TO EXTEND TIME TO APPEAL

Argument is given on P-124 et seq and will not be repeated here.

IV.THE APPEALS COURT ERRED AS IT HAD JURISDICTION, EVEN THOUGH THE TRIAL COURT DENIED THE MOTION FOR EXTENTION TO APPEAL.

See page 128 for argument.

V. THE APPEALS COURT ERRED IN HOLDING THAT THE NOTICE OF THE APPEAL WAS UNTIMELY AS THERE WERE CIRCUMSTANCES THAT PREVENTED THE TIMELY APPEAL UNDER THE CIRCUMSTANCES.

See page 128 et seq for argument.

VI.THE TRIAL COURT ABUSED ITS DISCRETION

IN NOT RELEASING THE DEFENDANT AIRES STAR TREK AS FUNDS HAVE BEEN TENDERED TO THE COURT FOR ITS RELEASE.

Two motions are before this Court for the release of the defendant. One sent June 30, 1988, and the second September 27, 1988. The Court has been tendered $44,995.78 dated 6/30/88 and has possession of the check. In spite of authority of Rule E, 4(f) for the release from arrest, the Court refuses to release the boat or give a ruling on why not. The 11th Circuit has had a FRAP 8 Motion sent July 14, 1988 because of the insensitivity of the Zlock Court, and likewise there has been no reponse or ruling from that Court.

CONCLUSION

Appellant prays that this Court grant the Petition for Certiorari; that this case be dismissed for lack of jurisdiction; alternatively that this case be remanded for trial; that Rule 11 Sanctions be imposed on the Plaintiff as it persisted in prosecuting this case, knowing that the vessel was unfinished, under construction, and never commissioned; and for general relief.

Respectfully submitted,

Bernard J. Dolenz

CERTIFICATE OF SERVICE

Three copies of the foregoing instrument were sent by regular mail to Steven Perry, Plaintiff's Attorney, P. O. Drawer 24, Stuart, FL 33497-0024 on this the ___th day of February, 1989.

88-1407

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ORAL ARGUMENT REQUESTED

IN THE

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No. A-553

BERNARD J. DOLENZ,

Appellant,

V.

STUART YACHT BUILDERS, INC.,

Appellee.

APPENDIX

Bernard J. Dolenz
6102 Swiss Avenue
Dallas, Texas 75214

Pro Se

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(DOCKET SHEET)

DATE	/DOC.#/	PLEADING
1987		
Feb 3		
	27 /19/	MOT. to widraw as counsel for Def.
	27 /20/	MOT. to cont. by Deft.
Mar 12	/21/	ORDER (WJZ-3-12-87) m/to/w/draw as counsel (dkt #19) is DENIED, m/to cont (dkt #20) is DENIED (EOD3-13-87)
	13 /22/	NOTICE of trial conflict by deft.
	16 /23/	MINUTES 3-16-87 hrg on 1st day of trial - trial concluded
Mar 19	/24/	ORDER (WJZ-3-19-87) m/to w/draw as counsel is GRANTED (EOD3-20-87)
	20 /25/	NOTICE of m/for intervention, rule 24(a)., by intervening pltf
	20 /26/	COMPLAINT in personam against Boatyard for negligent performance of repairs; wrongful arrest, by intervening pltf.
	20 /27/	MOTION to dismiss & MOTION to reconsider., by intervening pltf.
	20 /28/	BRIEF in supp of DOC #27

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA - ADMIRALTY DIVISION

STEWART YACHT BUILDERS, INC.,

Plaintiff

VS. NO. 8668384-CIV-Zloch

ARIES STAR TREK, enrollment #55798, together with all tackle and apparel

NOTICE OF MOTION FOR INTERVENTION,

Rule24(a)

TO THE HONORABLE JUDGE OF SAID COURT:

PLEASE TAKE NOTICE, that upon the attached affidavit of Bernard Dolenz, verified March 18, 1987, and upon the annexed proposed complaint, the undersigned moves this court to set a date so Intervenor/attorney can be heard for an order permitting Bernard Dolenz to intervene as a plaintiff in this action in order to assert his claim against the defendant vessel, ARIES STAR

TREK, set forth in the proposed complaint annexed hereto, pursuant to the provisions of Rule 24(a) of the Federal Rules of Civil Procedure, on the ground that the proposed intervening plaintiff claims an interest in the defendant vessel, ARIES STAR TREK, and its proceeds and the disposition of this action might impair or impede said proposed intervening plaintiff's ability to protect his interest.

S/s 3-18-87

CERTIFICATE OF SERVICE

Copies of the foregoing instruments have been sent by regular mail to:

Stephen Perry, Attorney
555 Colorado avenue, suite 1
P.O. Box 24
Stewart, Florida 33495-0024

Lyman Reynolds, Attorney
P.O. Box 709
West Palm Beach, Florida 33402

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA - ADMIRALTY DIVISION

STEWART YACHT BUILDERS, INC.,

Plaintiff

VS. NO. 8668384-CIV-Zloch

ARIES STAR TREK, enrollment #55798, together with all tackle and apparel

MOTION TO DISMISS; MOTION TO RECONSIDER

TO THE HONORABLE JUDGE OF SAID COURT:

1. Plaintiff Stewart Yacht had the Defendant ARIES STAR TREK arrested for alleged debt for work and materials done on her; Melissa Keyes, having an ownership interest has answered herein by and through her attorney of record, Lyman Reynolds.

2. Melissa Keyes has contended that the work and materials were not done in a good workman like manner and that the vessel had dangerous and unseaworthy

conditions resulting form the improper work performed on the Defendant vessel by the Plaintiff. In addition the work and materials billed for were inflated or in many instances were not placed on the vessel.

3. Intervenor Bernard Dolenz obtained an oral assignment of the Defendant vessel March 14, 1987 at 6102 Swiss Avenue, Dallas, Texas 75214 by and through Melissa Keyes agent Tom Brinson, subject to approval and ratification in writing by Melissa keyes, which was done March 15 or 16, but which was never delivered to Bernard Dolenz. It is through this assignment interest that Bernard Dolenz is claiming an interest in the Defendant vessel.

4. Shortly before this case was to go to trial, Lyman Reynolds wanted to withdraw from the case as counsel and had asked the Court to both withdraw and continue the case. The Court apparently

allowed Lyman Reynolds to withdraw, but did NOT continue the case, in essence placing the Defendant vessel in a default posture, as it was then without representation and could give no defense.

THE COURT HAS NO JURISDICTION AS THE MARITIME LIEN WAS DEFECTIVE AS THE DEFENDANT VESSEL WAS NEVER COMPLETED

5. The Defendant vessel was never completed. The bottom side was not finished, but could withstand water before it was drydocked, and was brought in for repair to its undersurface to be seaworthy. The topside never had masts or hardware. In short, the boat was incompletely built and was in the process of being finished. Therefore, the maritime lien on the vessel is invalid, and this Court should dismiss the In Rem proceeding brought against this Defendant vessel as it has no jurisdiction over the matter.

THE COURT SHOULD REOPEN THE CASE, -
ALTERNATIVELY, AND
ALLOW INTERVENOR TO DEFEND THE DEFENDANT VESSEL
IN THE INTERESTS OF JUSTICE

6. When the Court would not continue the case March 16, 1987 and allowed the attorney to withdraw, the Defendant vessel was in a default posture and could not defend itself. While the Court knew that Melissa Keyes had assigned the interests of the Defendant vessel to Bernard Dolenz a day or so earlier, such assignment was never delivered, and therefore she had equitable title to the vessel,a nd should have been allowed to have counsel represent her and the Defendant vessel's interests in the interest of justice. The Court also had information that Bernard Dolenz was assigned the Defendant vessel and that Bernard Dolenz had calls into the Court in the morning

hours of March 16 requesting of this Court a continuance under the circumstances, since Lyman Reynolds, the attorney of record had apparently abandoned the case when it was called to trial with his request for a continuance being refused.

The continuance was not asked to purposefully delay the trial, but was done so that justice could be done under the circumstances as without counsel and in a posture of default, the Defendant vessel and its owner was "thrown to the sharks", as it could not present its side of the case or its defenses.

WHEREFORE, PREMISES CONSIDERED, Intervenor prays that:

1. The In Rem proceeding against the Defendant Aries Star Trek be dismissed as the Court is without jurisdiction;

2. Alternatively, that Intervenor be given at least 90 days to do discovery

and prepare his case to have the trial heard on its merits, and for

3. General Relief.

Respectfully submitted,

BERNARD J. DOLENZ, J.D., M.D.
6102 Swiss Avenue
Dallas, Texas 75214
214/821-0220
S.B.N. 05057750

AFFIDAVIT

STATE OF TEXAS

COUNTY OF DALLAS

"My name is Bernard Dolenz. I am over 21 years of age, have never been convicted of a felony, and am competent to make this affidavit.

On March 14, 1987 an assignment of the Aries Star Trek, an incompleted vessel located at Stewart, Florida was entered into between myself and Tom Brinson, acting agent for Melissa Keyes approval and ratification in writing. Tom Brinson in person made this oral assignment at 6102 Swiss Avenue, Dallas, Texas 75214.

As of March 16, 1987, I had not received delivery of the assignment.

I had seen the Aries Star Trek at Stwart, Florida several weeks ago where I also casually met the shipyard principal. At that time I was aware that much bottom work needed to be done

as the wood was naked in several places on the bottom. The boat had never been completed, and was still in the process of being built. the bottom part of the vessel did not have the electrical or plumbing intact and needed hook up of appliances. The rudders were off, and the steering mechanism was not intact. there had been no masts made for the vessel according to information available; there were no places on the topside to place the masts as there was no evidence of any fittings topside. there was no life lines or stay line fittings noted.

On March 16, 1987 I tried unsuccessfully to reach Judge Zloch to indicate that I desired a continuance of the case, as I had an assignment, although not delivered, and understood that Lyman Reynolds wanted to withdraw for personal reasons. I tried to reach Judge Zloch several times during the morning when

Lyman Reynolds' office had represented to me that Lyman Reynolds was present and before the Court. I received no response from Judge Zloch directly, although a clerk communicated to me that I would have to file a motion/motions with the Court. I had communicated to the clerk my concern and desire for a continuance of the case under the circumstances. No jurisdiction over my person has been obtained.

Bernard J. Dolenz, J.D., M.D.

(Notarized March 18, 1987)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA - ADMIRALTY DIVISION

STEWART YACHT BUILDERS, INC.,

Plaintiff

VS. NO. 8668384-CIV-Zloch

ARIES STAR TREK, enrollment #55798, together with all tackle and apparel

BRIEF IN SUPPORT OF MOTION TO DISMISS; MOTION TO RECONSIDER

TO THE HONORABLE JUDGE OF SAID COURT:

THE COURT HAD NO JURISDICTION AS THE MERITIME LIEN WAS DEFECTIVE AS THERE WAS NO UNDERLYING MARITIME CONTRACT.

The underlying action against the Defendant vessel is defective as it is basically a dispute over charges, and is not grounded in a maritime contract. GENERAL ENGINE & MACH. WORKS, INC. V. SLAY, D.C. Ala. 1963, 222 F. Supp. 745 holds: "If contract is not directly or substantially related to navigation, even though it is to be performed on

water, or on board, or for benefit of vessel, it cannot be enforced in admiralty court."

THE VESSEL IS IN THE PROCESS OF BEING BUILT AND HAS NEVER BEEN FINISHED, AND THEREFORE CANNOT BE GROUNDED IN A MARITIME CONTRACT

NILO BARGE LINE, INC. V. M/V BAYOU DULARGE, CA NO. 1978, 584 F 2D 84 holds: "Contract for building or supplying materials for original construction and outfitting of ship is not maritime contract."

TROPWOOD, A.G. V. TAE CHANG WOOD INDUSTRY CO., LTD. D.C. ILL. 1978, 454 F. Supp. 964 holds: "In general, to invoke admiralty jurisdiction over a contract, subject matter must be wholly maritime in nature; contract must directly concern navigation or commerce on navigable waters."

MELISSA KEYES HAD EQUITABLE TITLE TO THE DEFENDANT VESSEL MARCH 16 AS THE

ASSIGNMENT TO BERNARD DOLENZ HAD NOT BEEN DELIVERED TO HIM OR HIS ATTORNEY, AND HER ATTORNEY SHOULD NOT HAVE BEEN PERMITTED TO WITHDRAW UNDER THE CIRCUMSTANCES; OR IF PERMITTED, THE TRIAL SHOULD HAVE BEEN CONTINUED.

"Where the assignment is by a written instrument, simply signing or acknowledging the instrument is not sufficient to transfer the property, and delivery of the instrument is necessary to complete the assignment. "HEYMAN V. KLINE, D.C. Conn., 344 F. Supp. 1088, affm in part and reversed in part on other grounds, D.A., 456 F2d 123, cert. den. 93 S. Ct. 53, 409 U.S. 847, 34 L. Ed. 2d 88.

So, the mere endorsement of a transfer on an instrument without proof of delivery, will not be sufficient to establish the assignment thereof. ILLINOIS POWDER MFG. CO. V. SECURITY

BANK AND TRUST CO., 50 P2d 411, 174 Okla. 293; MANEY V. CHERRY, 41 P2d 82, 170 Okla. 469. Accordingly Melissa Keyes had standing to defend the vessel as she had equitable title to the vessel, and should have been given the opportunity to have counsel represent her since her own attorney had been given permission to withdraw from the case, which under the circumstances had the appearance of abandment.

(CAPTION)-U.S. DISTRICT COURT

CLAIM OF BERNARD J. DOLENZ

COMES NOW, BERNARD J. DOLENZ, and presents his claim as follows:

1. BERNARD J. DOLENZ is the owner of the seized property identified as the "ARIES STARTREK, ENROLLMENT NO. 555798, TOGETHER WITH ALL TACKLE AND APPAREL", of said vessel. On March 14, 1987, an agent of Melissa Keyes gave an oral assignment of the above seized property to Bernard J. Dolenz in Dallas, TX which was ratified subsequently by Melissa Keyes, said assignment being notorized March 23, 1987, and being delivered in Dallas, TX on March 26, 1987 to Bernard J. Dolenz.

2. BERNARD J. DOLENZ is the owner of the aformentioned vessel and any of its

tackle, apparel, appurtenances and other equipment in the possession of the Plaintiff, both at the shipyard at 450 Southwest Salerno Road, Stuart, Florida, 33494, the Mini Bay Use Storage, at 1105 N.E. Industrial Boulevard, Jensen Beach, Florida, storage bin no. 199 and any other location to which any of the appurtencances, tackle and other equipment at whatever location said equipment has been removed and placed.

3. BERNARD J. DOLENZ, as the owner of the "ARIES STARTREK" and its tackle, appurtenances, apparel and equipment demands its restitution and the right to defend this action.

Bernard J. Dolenz

(Notarized April 3, 1987)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORID

ADMIRALTY DIVISION

CASE NO. 86-8384-CIV-ZLOCH

STEWART YACHT BUILDERS, INC.,

Plaintiff

VS.

ARIES STAR TREK, enrollment #55798, together with all tackle and apparel

Defendant.

_____/

BRIEF TO SUPPORT THE MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

THE COURT LACKS JURISDICTION

The Plaintiff assumes that jurisdiction exists choosing for his own reason to have this case decided by an admiralty court hoping that the jurisdictional point may be easily over-looked by the Court when it is dealing with the contract having a nautical favor.

An inspection of the Plaintiff's documents confirm that exploratory carpentry, design and engineering, keel fabrication, design engineering and consultation, placing in a stearing system, and alterations to the vessel all relate to the original construction of the vessel. EXHIBIT "A"

This contract, being one for services of a ship, does not furnish a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333(1). In Bond v. F/V Mermaid (1970, DC Fla) 311 F. Supp 1013, a naval architect filed a complaint in rem against a vessel for alterations and additions to its plans ordered by the owners of the Defendant vessel, asserting admiralty jurisdiction, but the Court found that the extra work performed, that is, drafting, conferences, calculations, and the like, all related to the original construction of the vessel, and that

services furnished under the later agreement for changes were supplied in contemplation of completing the original undertaking for the design and supervision of the vessel's construction. This contract, being one for services furnished in the construction of a ship, does not furnish a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333 (1), the Court concluded.

The Plaintiff's own invoices and statements indicate that Mr. Burdick knew that the boat was "only about 70% completed". EXHIBIT "B". In EXHIBIT "B", Burdick indicates that he is in the process of re-designing the unfinished boat. the bottom-side still required interior finishing, installation of wiring, plumbing, steering mechanisms, engine fittings, desk fittings, masts and riggings. The boat was never

completed because of lack of funds to complete her by the previous owners.

Lack of jurisdiction may be raised at any time, even upon a second appeal of an action in which the point was never raised in the trial court, and was not advanced in a previous appeal (Flota Maritima Browning de Cuba, Sociadad Anonima v. Snobl (1966, CA4 Md) 363 F2d 733, cert den 385 US 837, 17L Ed 2d 71, 87 S Ct 82), and when raised must be examined and decided (Armstrong Cork Co. v. Farrell Line, Inc. (1948, DC Pa) 81 F Supp 848). Or the court itself may raise the issue, and, consequently, Plaintiff's counsel must be prepared to demonstrate admiralty jurisdiction to a court's satisfaction, and his failure to cary this burden when called upon by the Court, even though Defendants counsel also argues to the Court that there is no problem as to jurisdiction, will result in dismissal (Rhederei Actien

Gesellschaft Oceana v. Clutha Shipping Co. (1915, DC Md 226 F 339).

Agreements for alterations and additions to plans ordered by the owners are not maritime contracts and, hence, not within the purview of admiralty jurisdiction. This holding has been repeated many times by decisions of the United States Supreme Court beginning in 1857 with People's Perry Co. v. Beers (1857) 61 US 393, 15 L Ed 961. People's Ferry held that District Courts of the United States had no jurisdiction to proceed in admiralty to enforce liens for labor and materials furnished in constructing vessels to be employed in the navigation of waters to which the admiralty jurisdiction extends, pointing out that liens on vessels encumber commerce.

The Court said that it would be a strange doctrine to hold the ship bound in a case where the owner made the

contract in writing, charging himself to pay by installments for building the vessel at a time when she was neither registered nor licensed as a seagoing ship, and that as to the contract being purely maritime and touching rights and duties appertaining to navigation, it was a contract made on land, to be performed on land, the wages of the shipwrights having no reference to a voyage to be performed, so that they were bound to rely on their contract.

In Thames Towboat C. v. The Schooner "Francis McDonald" (1920) 254 US 242, 65 L Ed 245, 41 S C t 65, the United States Supreme Court held that the Plaintiff's contract to furnish materials, work, and labor for her completion made after the schooner was launched BUT WHILE NOT SUFFICIENTLY ADVANCED TO DISCHARGE THE FUNCTIONS FOR WHICH SHE WAS INTENDED, was not within the admiralty and maritime jurisdiction. (Emp. added).

THE DEFENDANT "ARIES STAR TREK" IS NOT A VESSEL

"The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Act of July 18, 18966 Ch 201 Section 1, 14 Stat 178, incorporated into the Revised Statutes as Section 3.

The "Aries Star Trek" has never been seaworthy, and has never been capable of being used as a means of transportation on water. Basically, this is why the "Aries Star Trek" was placed in the Plaintiff's hands so that she could become seaworthy. The Defendant never had a crew or machinery in operation that would make it navigable.

ALTERNATIVELY, DEFENDANT "ARIES STAR TREK" WAS A "DEAD SHIP".

Assuming that the Plaintiff contends that the Defendant "Aries Star Trek" was launched, which is denied by the Defendant, it should be clear that the "dead ship" doctrine would apply as the Defendant was withdrawn from any maritime activity or navigation and therefore would not fall within the admiralty jurisdiction. "A ship is made to plough the seas, and not to lie at the walls." The Poznan (1925, CA2 NY) 9 F 2d 838, revd on other grounds New York Dock Co. v. The Poznan, 274, US 117, 71 L Ed 955, 47 S Ct. 482.

In Nanna v. The Meteor (1950, DC NY) 92 F. Supp 530, affd (CA2) 184 F2d 439, cert den 349 US 933, 95 L Ed 673, 71 S Ct 497, the Meteor had been part of a reserve fleet which was purchased by the Plaintiff from the US Maritime

Commission. The boat's Coast Guard Certificate of Inspection had expired, as had her Certificate of Enrollment and license with the Bureau of Customs. The vessel was towed to New York where painting services were performed, and during that period it had no crew, light, heat, or power, and no machinery in operation. The Court found that in order for the Meteor to have been returned in navigation and commerce, there would have been required very extensive repairs AND PROPER DOCUMENTATION, and concluded that the Meteor was a "dead" ship.

This is analagous to the Defendant "Aries Star Trek" as it needs extensive work before it can even be seaworthy, and will require proper documentation before it can be returned for navigation and commerce.

The "dead ship" doctrine was considered in Hercules Co. v. The Brigadier General

Absolom Baird (1954, CA3 NJ) 214 F2d 66, where the District Court found as fact that at the time of labor and services for which a maritime lien was sought, the vessel "was not in commission and she was unable to sail, " and concluded that no maritime lien arose under 46 USC Section 971.

The Defendant is not in commission and is not able to sail as the top-side has never been out-fitted with masts and rigging.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant prays of the Court to dismiss this action as it lacks jurisdiction, there was no maritime contract the Defendant "Aries Star Trek" is not a vessel as defined in Admiralty Law; and alternatively, that the Defendant is a "dead ship", and for Rule 11 Sanctions

against the Plaintiff as the Court may deem proper for the vexatious and frivolous lawsuit brought into this Court without jurisdiction; and for costs of Court and attorney fees expended in defending this case; and for general relief.

Respectfully submitted,

Bernard J. Dolenz, J.D., M.D.

CERTIFICATE OF SERVICE

On the 4th day of April, a copy of the foregoing instrument and Claim of Bernard J. Dolenz was sent by regular mail to Steven Perry, P.O. Drawer 24, Stuart, FL 33495-0024.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.,
a Florida corporation,

Plaintiff,

vs. ORDER

ARIES STARTREK, Enrollment
No. 555798, together with
all tackle and apparel,

Defendant.

_____/

THIS MATTER is before the Court upon the Motion for Intervention (DE 25), the Motion To Dismiss and Motion To Reconsider (DE 27) and the Motion for Sanctions (DE 35) filed herein by Bernard Dolenz and the Court having reviewed the merits of said Motions, having reviewed the court file and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. The Motion For Intervention (DE 25) filed herein by Bernard Dolenz be and the same is hereby DENIED;

2. The Motion to Dismiss And Motion to Reconsider (DE 27) filed herein by Bernard Dolenz be and the same is hereby DENIED; and

3. The Motion for Sanctions (DE 35) be and the same is hereby DENIED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 25th day of September, 1987.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:
Bernard Dolenz,
Stephen Perry, Esq.

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

BERNARD J. DOLENZ,

Petitioner,

V. NO. 87-5862

HONORABLE WILLIAM J. ZLOCH, JUDGE OF THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA,

Respondent.

PETITION FOR WRIT OF PROHIBITION AND/OR WRIT OF MANDAMUS

The above named petitioner, Bernard Dolenz, herein applies, pursuant to Section 1651, Title 28, United Stated Code, and Rule 21 (a) of the Federal Rules of Appellate Procedure, for a writ of mandamus or, in the alternative, for a writ of prohibition, directed to the above

named respondent, the Honorable William J. Zloch, Judge of the U.S. District Court, Southern District of Florida. In support of this application petitioner states:

ORDER AND OPINION BELOW

On September 25, 1987, Respondent made and entered an order denying the Motion for intervention, the Motion to Dismiss because of lack of jurisdiction, the Motion to Reconsider, and Motion for Rule 11 Sanctions. A copy of the Order is attached as Exhibit "A".

STATEMENT OF FACTS

The facts necessary to an understanding of the issues presented by this application are as follows:

1. Melissa Keyes entered into an agreement with Plaintiff Stuart Yacht Builders, Inc. to do some design, engineering, exploratory carpentary, and replacement of inappropriate gear boxes and propellers among other things

(H9-H14) on an unfinished and uncommissioned "vessel". Ray Seese, Marine Surveyer for the Plaintiff admits that the vessel has never been completely finished or commissioned (G4), and the owner of Stuart Yacht likewise made similar statements (G6).

2. The work was not done satisfactorily (J14-J17) with exorbitant charges, which was controverted and not paid, about which Plaintiff sued in Admiralty in rem, even though the Plaintiff knew that the boat was never commissioned or finished.

3. While the suit was pending, Melissa Keyes transferred and assigned the Defendant "vessel", AIRES STARTREK to Bernard Dolenz, notarizing same March 23, 1987 and delivering same to Dolenz in Dallas, Texas on March 26, 1987. (I). The Notice of Motion for Intervention was sent March 18 (J19), being sent with supporting documents by Express Mail (J1).

A Claim of ownership was sent April 3 (H17).

4. Several requests were made of the Court to dismiss this case because of lack of jurisdiction beginning March 18 (J), April 4 (H), April 18 (G), with repeated requests of the Court's clerk and secretary to set a hearing because of deterioration and irrepairable harm befalling the vessel because of its exposure to the sun and warping due to inaction (C & B).

5. Efforts to resolve the matter amicably were resistd by the Plaintiff; even after pointing out the jurusdiction issue, the Plaintiff and his attorney persisted in the prosecution in Federal Court. Accordingly, Rule 11 Sanctions were requested of the Court under the circumstances. (D,E,F). The Court gave no hearing regarding the Rule 11 Motion for Sanctions. The court has not rendered

a final judgment.

STATEMENT OF ISSUES

The issues involved are:

1. TO RESTRICT THE LOWER COURT TO AUTHORIZED EXERCISE OR JURISDICTION.

Here the Petitioner feels strongly that the Zloch Court does not have jurisdiction as there is no underpinning of a Maritime contract since the "vessel" has never been finished or commissioned as the Plaintiff readily admits.

The Supreme Court has expressly recognized that the writ is an appropriate remedy to restrict a lower court to a proper exercise of its prescribed jurisdiction. KERR V. U.S. DIST. COURT FOR NORTHERN DIST. (1976) 426 U.S. 394, 48 L. E. 2d 725, 96 S.Ct. 2119.

In EX PARTE REPUBLIC OF PERU (1943), 318 U.S. 578, 87 L Ed 1014, 63 S. Ct. 793, where the Supreme Court dealt with a motion for leave to file a petition for a

writ of mandamus restraining a judge of a Federal District Court from the further exercise of unauthorized admiralty jurisdiction over a vessel, the court stated that insofar as the purpose of a writ of mandamus directed by an appellate court to an inferior court is to exert revisory appellate power over the inferior court, the writ affords an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction.

2. TO COMPEL LOWER COURT TO EXERCISE ITS AUTHORITY WHEN THERE IS A DUTY TO DO SO.

In EX PARTE BURTIS (1881), 103 U.S. 238, 26 L. Ed 392, the court stated the "elementary"rule that the writ of mandamus may be used to compel an inferior tribunal to act on a matter within its jurisdiction, as regarded such rule as fully applicable in the determination of whether mandamus is available to control

the conduct of a lower federal court in a civil action.

KERR and EX PARTE PERU, supra, also elaborate on this premise.

3. TO COMPEL LOWER COURT'S COMPLIANCE WITH PRIOR MANDATES.

Where a lower Court has failed to comply with the Supreme Court's or other Appellate Court's prior mandate in a case, the writ of mandamus is an appropriate remedy to compel such compliance. PERKINS V. FOURNIQUET (1853) 55 U.S. 328, 14 L. Ed 441; BALTIMORE & O.R. CO. V. U.S., (1929) 279 U.S. 781, 73 L Ed 954, 49 S. Ct. 492. Here services on an unfinished vessel do not provide a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333 (1). BOND B. F/V MERMAID (1970, DC Fla), 311 F. Supp 1013.

REASONS WHY WRIT SHOULD ISSUE

1. This Court has jurisdiction to issue the Extraordinary Writs prayed for by

virtue of the "All Writs Statute," 28 USC Section 1651.

2. The damage to the Petitioner and the "vessel" is real and immediate as it is deteriorating and warping as it is not receiving even maintenance care to its planks and engines which need periodic start up.

3. The delay involved, even by an expedited appeal herein, is not warranted under the circumstances, and will result in additional irrepairable injury to Petitioner if it is required to wait for normal appellate review.

4. The Order has so far departed from the accepted and proper course of judicial proceedings as to call fo an exercise of this court's exercise of supervision, particularly in view of the continuing damages being sustained.

STATEMENT OF RELIEF SOUGHT

The relief sought by Petitioner herein is

as follows:

1. Petitioner askes this Court_ to prohibit respondent and the other judges and officers of that court from further exercise of jurisdiction over a proceeding in rem pending in that court against Petitioner's unfinished and noncommissioned vessel, ARIES STARTREK, and to direct the district judge to enter an order in the proceeding declaring the vessel is immune from suit in Admiralty as there is no jurisdictional basis.

2. That Rule 11 Sanctions be imposed upon the Plaintiff for wrongful arrest and attorney's fees expended in defending a case, which Plaintiff and his attorney knew was without jurisdiction or merit in Admiralty.

EXHIBITS

EXHIBITS "A" through "J" with subparts are incorporated by reference herein, and have been alluded to in the Statement of Facts

and are available for a better understanding of the matters set forth in this petition.

WHEREFORE, Petitioner respectfully prays that a writ of mandamus or, in the alternative, a writ of prohibition, be issued by this court directed to respondent, the Honorable William J. Zloch, Judge of the U.S. District Court for the Southern District of Florida as prayed for in the Statement of Relief Sought, and for such other and further relief as the Court may deem proper.

Dated this 1st day of October, 1987.

Respectfully submitted,

Bernard J. Dolenz

CERTIFICATE OF SERVICE

A copy of the foregoing was sent this 1st day of October, 1987 to William J. Zloch, U.S. District Judge, Room 202B, 299 East Broward Blvd, Fort Lauderdale, FL 33301 by Express Mail; and by regular mail to Stephen Perry, P. O. Drawer 24, Stuart, FL 33497-0024.

MARINE SPECIALIST
Ray Seese
40 SW Hideaway Place
Stuart, FL 33497
Consulting

SURVEY REPORT

SUMMARY:

...This vessel ...has never been completely finished or commissioned... Modifications to the vessel are being considered...The vessel has no standing or running rigging...The work to complete and commission this vessel is being done by Stuart Yacht Builders of Stuart, Flroida. It is recommended that when the vessel is completed a survey to update these findings and a sea trial be conducted.

(Statements of Plaintiff's expert)

One of world's largest catamarans is in Stuart

• From page A1

purchased it.

The family worked on the boat for several years, doing the electric work, installing two 453 GM Diesels, and completing much of the finish work, said Burdick.

Burdick estimates the boat is about 70 percent completed.

But for personal reasons the couple was unable to finish the job and two years ago they moved out of the state, leaving the Aries moored in a small creek of the South Fork.

The fiberglass-sheathed, double-planked mahogany construction is still perfect, said Burdick, and if the sale and survey goes well, it's the plan of the new owners to completely redo the boat and turn it into the show piece it was meant to be.

A lot of redesigning is planned.

Originally the boat was built for

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87-5862

IN RE:

BERNARD J. DOLENZ,

Petitioner.

(Filed October 21, 1987 in the U.S. Court of Appeals, Eleventh Circuit by Miguel J. Cortez - Clerk).

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Florida

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Before HILL and FAY, Circuit Judges.

The Petition for Writ of Mandamus is denied.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-5862

IN RE:

BERNARD J. DOLENZ,

Petitioner.

MOTION FOR REHEARING ON

PETITION FOR WRIT OF PROHIBITION AND/OR

WRIT OF MANDAMUS

TO THE HONORABLE JUSTICES OF SAID COURT:

1. Petitioner, Bernard J. Dolenz, moves for a Rehearing on the Petition for Writ of Prohibition and/or Writ of Mandamus, and would show as grounds as follows:

2. Lack of jurisdiction may be raised at any time, even upon a second appeal of an action in which the point was never raised in the trial court, and was not advanced in a previous appeal, FLOTA MARITIMA

BROWNING DE CUBA, SOCIADAD ANONINA V. SNOBL, 363 F2d 733 (CA4 Md, 1966), cert, den. 385 US 837, 87 S. Ct. 82, 17 L Ed 2d 71, and when raised must be examined and decided, ARMSTRONG CORK CO. V. FARRELL LINE, INC., 81 F. Supp 848, (DC Pa, 1948).

3. The Zloch Court has no jurisdiction, and if so has never ruled on it, and for what reasons. There is no underpinning of a Maritime contract as the vessel has never been finished or commissioned, as admitted by the Plaintiff.

4. The U.S. Marshall of the same Court in his Process Service of July 10, 1986 states: "ARRESTED THE ABOVE OCEAN GOING CATAMARAN C SEE ATTACHED INVENTORY. VESSEL IS INCOMPLETE, UNDER CONSTRUCTION, AND EMPTY OF EQUIPMENT" (Emp. added). See Exhibit "A".

5. Mandamus is appropriate to restrict the lower court to authorized exercise of jurisdiction, KERR V. U.S. DIST. COURT FOR

NORTHERN DIST., 426 U.S. 394, 96 S. Ct. 2119, 48 L. Ed 2d 725 (1976) and to compel the lower court to exercise its authority when there is a duty to do so, EX PARTE BURTIS, 103 U.S. 238, 26 L. Ed 392 (1881). Mandamus is also appropriate to compel the lower court's compliance with prior mandates. This vessel is unfinished, and services on an unfinished vessel do not provide a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333 (1). BOND V. F/V MERMAID, 311 F. Supp 1013, DC Fla. 1970.

WHEREFORE PREMISES CONSIDERED, Petitioner requests this Court to reconsider and rehear this Petition, and render an opinion that this case is without jurisdiction, and should be dismissed in the United States District Court for the Southern District of Florida.

Respectfully submitted,

Bernard J. Dolenz

CERTIFICATE OF SERVICE

A copy of the foregoing instrument was sent this 26th day of October 1987 to William J. Zloch, U.S. District Judge, Room 202B, 299 East Broward Blvd., Fort Lauderdale, FL 33301, and to Steven Perry, P. O. Drawer 24, Stuart, FL 33497-0024.

Bernard J. Dolenz

STUART YACHT BUILDERS, INC.

06-6581-CIV-ZLOCH

DEFENDANT: ARIES STARTREK, ENROLLMENT NO. 555790, TOGETHER WITH ALL TACKLE AND APPAREL.

TYPE OF PROCESS: CIVIL-IN REM

SERVE AT

NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN: ARIES STARTREK

ADDRESS (Street or R.F.D. Apartment No., City, State and ZIP Code): 450 S.W. Salerno Rd., Stuart, Florida 33494 N. END BADGE (S.R.) #707

SEND NOTICE OF SERVICE COPY TO REQUESTER AT NAME AND ADDRESS BELOW:

CRARY, BUCHANAN, DOWDISH & BOVIE, CHTD.
ATTN: STEVEN L. PERRY
555 Colorado Avenue, Suite One
Stuart, Florida 33495

Number of process to be served with this Form - 285	1
Number of parties to be served in this case	1
Check for service on U.S.A.	

SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING SERVICE (Include Business and Alternate Addresses, All Telephone Numbers, and Estimated Times Available For Service):

The vessel is located at the above address. This is the business address of the Plaintiff and service may be arranged at any time including weekends by contacting the Plaintiff at 283-1947.

Signature of Attorney or other Originator requesting service on behalf of: ☒ PLAINTIFF ☐ DEFENDANT

TELEPHONE NUMBER: (305) 287-2000

DATE: 6-30-06

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY — DO NOT WRITE BELOW THIS LINE

Acknowledge receipt for the total number of process indicated. (Sign only first USM 285 if more than one USM 285 is submitted)	Total Process	District of Origin	District to Serve	Signature of Authorized USMS Deputy or Clerk	Date
		No. 04	No. 04		7-9-06

I hereby certify and return that I ☐ have personally served, ☐ have legal evidence of service, ☒ have executed as shown in "Remarks", the process described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., shown at the address inserted below.

☐ I hereby certify and return that I am unable to locate the individual, company, corporation, etc., named above (See remarks below)

Name and title of individual served (if not shown above): BURDICK

☐ A person of suitable age and discretion then residing in the defendant's usual place of abode

Address (complete only if different than shown above):

Date: 7/10/06 Time: 10:00 ☒ am ☐ pm

Signature of U.S. Marshal or Deputy: Rudolf Fuad

Service Fee	Total Mileage Charges (including Forwarding)	Forwarding Fee	Total Charges	Advance Deposits	Amount owed to U.S. Marshal*	Amount of Refund*
60.00						

REMARKS: 7/10/06 ARRESTED THE ABOVE OCEAN GOING CATAMARAN (SEE ATTACHED INVENTORY.) VESSEL IS INCOMPLETE UNDER CONSTRUCTION AND EMPTY.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-5862

(Filed January 27, 1988 in the U.S. Court of Appeals, Eleventh Circuit by Miguel J. Cortez - Clerk).

IN RE: BERNARD J. DOLENZ, Petitioner.

On Petition for Writ of Mandamus or Prohibition to the United States District Court for the Southern District of Florida

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Before HILL and FAY, Circuit Judges. BY THE COURT:

Petitioner's "Motion for Rehearing", construed as a Motion to Reconsider this Court's Order of October 21, 1987, is DENIED.

Petitioner's Motion to Expedite is DENIED AS MOOT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.,
a Florida Corporation,

Plaintiff,

vs. FINAL JUDGMENT

ARIES STARTREK, ENROLLMENT
NO. 555798, TOGETHER WITH
ALL TACKLE AND APPAREL,

Defendant.
_____/

THIS MATTER was tried before the Court, without a Jury, on March 16, 1987.

In addition, presently before the Court is a Motion For The Award of Costs and Attorneys' Fees (DE 33) filed herein by the Plaintiff, Stuart Yacht Builders, Inc.

Present for the bench trial on March 16, 1987 were counsel for the Plaintiff and Ms. Melissa Keyes. Ms. Keyes was accompanied by her counsel of record. Ms. Keyes had filed a Claim (DE 13) claiming that she was

the owner of the seized property. The Claim bore Ms. Keyes signature, was notarized and "sworn to."

Prior to the commencement of trial, Ms. Keyes stated in open court that she had transferred all of her ownership interest in the Defendant vessel to Mr. Bernard Dolenz on March 15, 1987. Ms. Keyes handed up to the Court a copy of the written "Assignment" dated March 15, 1987. She further stated that she had no further interest in said vessel. These representations were not disputed by her lawyer and indeed, formed the basis for the ore tenus Motion to Withdraw as counsel for Ms. Keyes and the Defendant vessel made by the law firm or Roberts & Reynolds in open court. This Court in its Order (DE 24) dated March 19, 1987, granted the ore tenus Motion to Withdraw.

As is reflected in this Court's prior Order (DE 24), at no time was Mr. Bernard

Dolenz present in court and at no time did any individual appear on his behalf. Ms. Keyes stated that she was not authorized to represent Mr. Dolenz or to speak on his behalf but that she had spoken with himover the course of the previous-weekend and that Mr. Dolenz was aware of the date of trial and "hoped" for a continuance. At no time prior to trial did Mr. Dolenz or any representative of Mr. Dolenz request a continuance of the trial of this matter.

Ms. Keyes further advised the Court that Mr. Dolenz had not and did not wish to retain Ms. Keyes' counsel of record to represent the Defendant vessel in the above-styled cause. Ms. Keyes further stated to the Court that Mr. Dolenz would represent himself. Additionally, Ms. Keyes stated that she discharged the law firm of Roberts & Reynolds and Mr. Lyman Reynolds, Jr., Esquire, her counsel of record from any

further representatiton of her and the Defendant vessel in this cause.

This Court is not asked to pass upon the validity of the hand-written "Assignment" and no comment is made by the Court on that issue. However, assuming arguendo that the "Assignment" is valid, this Court notes that Bernard Dolenz had notice of this bench trial and for whatever reasons chose not to appear. Assuming arguendo that the "Assignment" is not valid, then Ms. Keyes was present and in court during the entire bench trial and for whatever reasons chose to discharge her lawyer and further chose not to proceed in the matter or to put on any testimony or evidence in support of her claim.

Accordingly, the Court proceeded with the bench trial of this cause, there being no good and sufficient reason to continue same.

The Plaintiff presented documentary evidence and testimony through witnesses, Mr. Gregory Burdick and Mr. Raymond Sees.

Subsequent to the bench trial, counsel for the Plaintiff filed Motion for The Award of Costs And Attorney's Fees (DE 33), attaching to said Motion as Exhibit "A" and itemization of all time spent and the charges for same; Exhibit "B", which is a supporting Affidavit for attorney's fees; Exhibit "C" an Affidavit with respect to time spent by counsel for the Plaintiff; and Exhibit "D" which is and Affidavit of Costs.

At the conclusion of the Plaintiff's case and after the Plaintiff rested, the Court called the case of the Defendant or any claimant. There was no response and no individual appeared in the courtroom on behalf of the Defendant and, although present in the courtroom during the entire proceeding, Ms. Keyes did not come forward and put on any testimony or evidence.

The Court notes that Bernard J. Dolenz represents himself to be a lawyer in the State of Texas as well as a medical doctor.

Based on the testimony presented by the Plaintiff, the documentary evidence received by the Court, and the Court having reviewed the court file, makes the following Findings of Fact and Conclusions of Law. To the extent that any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such. Conversely, to the extent that any of the following Conclusions of Law constitute Findings of Fact, they are adopted as such.

FINDINGS OF FACT

1. Pursuant to the testimony at trial, the documentary evidence and the Claim (DE 13) filed by Melissa Keyes, the Court finds that Melissa Keyes at all times material was the owner of the vessel, Aries Startrek, and that all necessaries provided said vessel

were ordered by the owner or the owner's authorized agent.

2. Stuart Yacht Builders and Melissa Keyes entered into an agreement to perform services on the vessel Aries Startrek on July 1, 1985. (Plaintiff's Exhibit No. 3).

3. Stuart Yacht Builders agreed to dry dock the "Aries" at the rate of $216.00/month from 11-1-85 to 12-2-86 and $432.00/month thereafter. (Plaintiff's Composite Exhibit No. 6.)

4. The services were performed to return the vessel to proper navigational condition.

5. The services were performed in a workmanlike fashion and the time expended was reasonable.

6. All unpaid sums accrued interest at the rate of 18% per annum. (Plaintiff's Exhibit Nos. 3, Composite 6, and 19.)

7. On July 3, 1986 process of warrant for arrest of the "Aries" its tackle and apparel, was issued.

8. On July 10, 1986 process was served on the vessel and its tackle by the U.S. Marshal and custody relinquished to Greg Burdick as Court Appointed Substitute Guardian.

9. As substitute custodian, Stuart Yacht Builders provided maintenance, storage, security and bookkeeping services for the "Aries."

10. In accordance with the work authorization, Stuart Yacht Builders provided Ship Repair Liability Insurance for the "Aries." (Plaintiff's Exhibit Nos. 3 and Composite 6.)

11. In accordance with the work authorization, Stuart Yacht Builders provided Hull Liability Insurance for the "Aries." (Plaintiff's Exhibit Nos. 3, Composite 6 and 19.)

12. In accordance with this Court's Order of July 3, 1986 appointing Stuart Yacht Builders Substitute Custodian, Hull

Liability Insurance was provided for the "Aries." (Plaintiff's Exhibit Nos. Composite 6 and 19.)

13. As Substitute Custodian, Stuart Yacht Builders paid all storage charges for the warehouse containing the "Aries" tackle and apparel. (Plaintiff's Exhibit Nos. Composit 6 and 19.)

14. The "Aries Startrek" is a vessesl within the meaning of 46 U.S.C. Section 971.

15. No testimony or physical or documentary evidence was presented by the Defendant or any Claimant.

16. The Court finds that the following costs incurred by the Plaintiff, through its attorney are authorized by law:

Clerk, United States District Court - Filing custodial bond	$ 500.00
United States Marshal Arrest vessel	1,000.00
Marshal's Ins. and fees	1,000.00

Stuart News Notice of Publication	22.10
TOTAL	$2,522.10

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 28 U.S.C. Section 1333.

2. This is an Admiralty and Maritime Claim within the meaning of Rule 9(h).

3. The Plaintiff is a corporation doing business in the Southern District of Florida.

4. The vessel subject to this action is within the jurisdiction of this Court and the court has jurisdiction over same.

5. The "Aries Startrek" is a vessel within the meaning of 46 U.S.C. Section 971.

6. The services, repairs, drydock and necessaries furnished by the Plaintiff are within the scope of 46 U.S.C. Section 971.

7. The services, repairs, drydock and necessaries were furnished by the Plaintiff

upon the authority of a person within the scope of 46 U.S.C. Section 972.

8. A rebuttable presumption of a maritime lien is created by the furnishing of necessaries ordered by the owner or the owner's authorized agent. Belcher Oil Company v. M/V Gardenia, 766 F.2d 1508 (11th Cir. 1985); 46 U.S.C. Section 971.

9. The Defendant and the owner (Claimant) have not overcome the rebuttable presumption of a maritime lien and have failed to satisfy their burden of proof in establishing that the providing of the necessaries was not authorized to bind the vessel or the owner.

10. The Plaintiff is entitled to a maritime lien pursuant to 46 U.S.C. Section 971 and to a judgment foreclosing the lien.

11. The Plaintiff is entitled recover reasonable custodia legis expenses.

12. Absent some statutory authorization, the prevailing party in an admiralty case is not generally entitled to an award of attorneys' fees. Noritake Co., Inc. v. M/V Hellenic Chamption, 627 F.2d 724 (5th Cir. 1980) Therefore, no attorneys' fees will be awarded to the Plaintiff in this matter.

Accordingly, it is

ADJUDGED that the Plaintiff, Stuart Yacht Builders, Inc., a Florida corporation, shall recover against the Defendant, Aries Startrek, Enrollment No. 555798, Together with All Tackle And Apparel, the following sums:

a) Sales tax with interest due through 3/16/87	$1,719.61
b) Repair ins. with interest due through 3/16/87	477.87
c) Hull ins. with interest due through 3/16/87	3,904.83
d) "Mini Bay" storage with int. due through 3/16/87	882.67
e) Storage charges with int. due through 3/16/87	7,085.72

f) Labor and material with int. due through 3/16/87	22,307.08
g) Additional costs incurred as Substitute Custodian	
i) routine maintenance	952.00
ii) bookkeeping expenses	420.00
h) Court costs	2,522.10
TOTAL DUE THROUGH TRIAL - 3/16/87	$38,899.88

IT IS FURTHER ADJUDGED that prior to the time set for sale below, the vessel may be redeemed by paying a total of the sums due to the Plaintiff, together with interest at the rate of twelve (12%) percent per annum and all costs of this action accruing subsequent to this Judgment. If the Plaintiff is not paid prior to the time set for the sale, then the Marshal of This Court shall sell the vessel on the ____ day of ____ __, 1988, at _____ o'clock _.m. to this highest bidder for cash, except as set forth hereinafter.

Prior to the above-referenced sale date, the Marshal shall have filed with This Court

and provided a copy to counsel of record, proof of compliance with Local Rule 4 regarding publication of the Notice of Sale. Upon holding the sale, a single Certificate of Sale, Certificate of Title and Certificate of Disbursement shall be filed as to the vessel sold and the proceeds of the sale shall be applied to the Judgment of Record and to satisfy any costs incurred by the Plaintiff subsequent to the Judgment. In the event that there is an excess above and beyond the Judgment and costs, this amount shall be placed in the registry of the Court to be disbursed upon the appplication of the individuals claiming to be the owners of the vessel at the time this Judgment was entered.

IS FURTHER ADJUDGED that the Plaintiff shall advance all subsequent costs of this action and shall be reimbursed for them by the Clerk if the Plantiff is not the purchaser of the vessel. If the

Plaintiff is the purchaser of the vessel, the clerk shall credit the Plaintiff's bid with the total sums due pursuant to the Judgment together with interest and anycosts incurred subsequent to judgment.

On the filing of the Certificate of Title, all named Defendants to this action and all persons claiming under or against those Defendants since the filing of the original Proof of Publication in this action shall be foreclosed of all claims and interest in the vessel the "Aries Startrek" as fully described in the Certificate of Title, and the purchaser at the sale shall be let in possession of the vessel.

IT IS FURTHER ADJUDGED that jurisdiction of ths action is retained for the purpose of entering such further Orders as may be necessary and proper including with limitation writs of possession.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 16th day of February, 1988.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

Steven L. Perry, Esquire

Melissa Keyes
c/o Turks Island Divers
Hotel Kittina
P.O.Box 42, Grand Turk
Turks and Caicos, British West Indies
or

P.O. Box 281
Deltaville, Virginia 23043
or

6868 Southeast Gaines Avenue
Stuart, Florida 34997
or

816 Southeast Ninth Street
Deerfield Beach, Florida 33441
or

Box 266781, West Oakland Park Blvd.
Fort Lauderdale, Florida 33311

U.S. Marshals Service

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

STUART YACHT BUILDERS, INC.,)

vs. CASE NO. 88-971

Aries Startrek together with
all tackle and apparel.

Defendant.

_____/

TRIAL TRANSCRIPT

Before the HONORABLE WILLIAM J. ZLOCH,

United States District Judge.

APPEARANCES OF COUNSEL:

For the Plaintiff:

Crary, Buchanan, Bowdish & Bovie
BY: Steven L. Perry, Esquire
and Robert L. Lord, Jr., Esquire
555 Colorado Avenue, Suite One
Stuart, Florida 34994

For the Defendant Keyes:

REYNOLDS & ROBERTS
BY: Lyman H. Reynolds, Esq.
319 Clematis Street
West Palm Beach, Florida

Reported by: Gary D. George
810 N.W. 86 Avenue
Plantation, Florida 33324
305-476-0723

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Gregory Burdick	19			
Raymond Seese	30			

P R O C E E D I N G S

THE DEPUTY CLERK: Calling case 86-8384-Civ-Zloch, Stuart Yacht Builders, Inc. versus Aries Startrek together with all tackle and apparel.

Counsel, please, state your appearance for the record?

MR. PERRY: Steve Perry and Robert Lord on behalf of the Plaintiff.

THE COURT: Good morning.

MR REYNOLDS: Lyman Reynolds and Bill Zidno on behalf of the Defendants.

THE COURT: All right, Mr. Reynolds, you wanted to address the Court, sir?

MR. REYNOLDS: Yes, sir.

As I have apprised Your Honor's staff since Friday when we were apprised of this case going to trial today on Monday, we have been trying to get ahold of our client, the owner of the Aries Startrek, Ms. Keyes.

I spoke with your secretary on Friday and again this morning at 8:30 I spoke with your

secretary and the Clerk Deputy at 8:30 with regard to our inability to locate Ms. Keyes.

At 9:15 as we were preparing to leave for court here this morning Ms. Keyes called from the courthouse here to inform me that she was here and she had received a message that we had left throughout all of here known addresses, acquaintances, associates.

However, at that time for the first time she informed me that she no longer owned the Aries Startrek.

I would point out to Your Honor that she had filed an affidavit of ownership and had hired my firm to represent her in this matter.

THE COURT: Hold on for a minute.

MR. REYNOLDS: That was filed in August, Your Honor.

THE COURT: Docket entry 13 in the court file is a claim of Melissa Keyes which states in paragraph one, "Melissa Keyes is the owner of seized property identified as

Aries Startrek enrollment number and it is 555798 together with all tackle and apparel of said vessel."

Paragraph two reads in part: "Melissa Keyes is the owner of the aforementioned vessel and any of the tackle, apparel, appurtenances and other equipment in possession of the Plaintiff."

Paragraph three reads in its entirety: "Melissa Keyes, as the owner of the Aries Startrek, and its tackle and appurtenances, apparel and equipment demands its restitution and the right to defend this action."

Then there is a signature line which purports to bear the signature of an individual identified as Melissa Keyes and then it is sworn to and subscribed on the first day of August, 1986, bearing the impression seal of a notary public of the State of Florida by the name of Lori Ann Bielak and there is a signature line which

purports to bear the signature of an individual by the name of Lori Ann Beilak.

That is docket number 13 in the court file.

There is nothing else in the court file that indicates that Melissa Keyes is not the owner of the Aries Startrek and the claim that I earlier refered to, docket entry number 13, has not been modified or withdrawn by and pleading or motion filed in the court files as of right now.

And you, Mr. Reynolds, you were informed when, sir, that Ms. Keyes, in facts, does not, at least you were told that she does not own the vessel in question?

MR. REYNOLDS: I was told by Melissa Keyes this morning at 9:15 when she contacted my office from the courthouse telling me that she had received the message about the proceedings this morning. "And there is something else I need to tell you, I no longer own the Aries Startrek. It has

been transferred to an individual in the State of Texas."

THE COURT: When did that transfer of ownership take place?

MR. REYNOLDS: Well, I have an assignment of interest dated March 15, 1987, which was handed to me at a quarter of 11:00 this morning, twenty minutes ago by Ms. Keyes.

Ms. Keyes is here and can testify with regard to her lack of ownership, what her representations to me in that regard have been and my knowledge that for the first time I am no longer retained by the owner of the vessel.

The individual, Bernard Dolenz, is in Dallas, Texas. He is an attorney there. I have been informed by Ms. Keyes that he wants to represent himself on behalf of the boat in this action and I have not been retained nor has my firm been retained by Mr. Dolenz in this action.

THE COURT: Is Ms. Keyes in the courtroom?

THE REYNOLDS: Yes,sir.

THE COURT: Are you Ms. Keyes?

MS. KEYES: Yes, sir.

THE COURT: All right, go ahead, Mr. Reynolds.

MR. REYNOLDS: It would be my request on behalf of our firm that we be, it's moot, we are no longer representing the vessel. We have not been retained by the true owner of the vessel.

We have just learned of this and would have filed a motion to that effect earlier with the Court if we had been apprised of it any earlier than today.

I have been informed that Mr. Dolenz does not want to retain our firm to represent him in this matter on behalf of the vessel. He wishes to represent himself as an attorney and would want to be substituted as counsel and that he wants to continue the action in

order for him to adequately defend the action and with regard to a continuance in this matter I would simply want to point out to the Court that--

THE COURT: You are not authorized to make any motion for continuance on behalf of the new owner; are you?

MR. REYNOLDS: No Sir. He has not retained me for that purpose. This was just given to me by Ms. Keyes that that was his desire. I have not spoken with Mr. Dolenz at all with regard to this matter.

The position with regard to a continuance in this case would be, I assume, the fact that we have $180,000 vessel which is owned outright except for this action.

This action in the complaint seeks $26,000 in material, man, wharfage and other propert maritime lien action. It's not an impersonam action at all. And the value of the vessel is, at least, five times the value of the claim against it.

Therefore, there would not be any prejudice in allowing Mr. Dolenz his continuance of this matter to the plaintiff.

But as Your Honor has correctly pointed out, Mr. Dolenz, has not authorized me to make that motion on his behalf.

I have been retained in no way by him.

However, that desire has been passed on to me by Ms. Keyes.

THE COURT: All right, let me hear from Ms. Keyes.

MR. REYNOLDS: Do you want her to take the stand?

THE COURT: I would like her to step up to the podium.

Ma'am, state your name for the record?

MS. KEYES: My name is Melissa Keyes.

THE COURT: Mr. Reynolds, with respect to the assignment of ownership or what was the document that your referred to?

MR. REYNOLDS: This is a handwritten notice of assignment of interest in Aries Startrek.

THE COURT: May I see that, please?

Ms. Keyes, explain to me what the document is that you have there?

MS. KEYES: Well, sir, Mr. Dolenz has been a partner of mine on this boat for several months now. I showed it to him just after Christmas and he loved the boat and he wanted to buy an interest in it which he did and paid me.

And not being very well prepared for this case as I have been trying to settle out of court until just the day before, I don't know the term, the day before the court date was set. This weekend, I heard Saturday that I was going to have court today and I talked to Mr. Dolenz and we agreed that I would assign him full ownership of the boat or all the rest of my interest in the boat.

THE COURT: When was that decided on?

MS. KEYES: We discussed it Saturday and Sunday and decided on Sunday.

THE COURT: I'm sorry, which dates? You say Saturday and Sunday. Specifically, which dates?

MS. KEYES: The 14th and 15th.

THE COURT: Of March?

MS. KEYES: Yes, sir.

THE COURT: of 1987?

MS. KEYES: Yes sir.

THE COURT: This past weekend you decided to transfer your ownership to Mr. Dolenz?

MS. KEYES: That's correct.

THE COURT: For consideration?

MS. KEYES: Yes, sir.

THE COURT: And what was the consideration?

MS. KEYES: The considerations are that I will be the captain of the boat and perhaps in the future I can buy back into the ownership of the boat.

THE COURT: What is the date on that handwritten assignment?

MS. KEYES: March 15.

I was unable to fly back to Texas to do this and discussed everything on the telephone. He wanted to try to call you this morning. He's in court also.

THE COURT: Well, is he flying in for the trial.

MS. KEYES: He was unable to fly in today.

THE COURT: What arrangements is he making to fly in for the trial?

MS. KEYES: I haven't discussed that with him. He definitely wants to represent himself.

THE COURT: I am sorry, I thought that you discussed with him the fact that you weren't prepared to go to trial. I thought that is what you indicated to me?

MS. KEYES: That he was not able to get out of his obligations today. He has a court case today.

THE COURT: I am sorry, say that again?

MS. KEYES: He has a court case himself. He was unable to get out of his obligations to fly up here today for the trial today. It was--everything was such at the last minute.

THE COURT: Are you Mr. Dolenz's representative here in Court today? Are you his authorized representative?

MS. KEYES: Yes. Not to try the case, no.

THE COURT: Did Mr. Dolenz tell you that you were his authorized representative to come into this courtroom, in this federal building, into this United States District Courtroom and to represent him?

MS. KEYES: He didn't say that, no, sir. He said he wanted to represent his interest in the boat.

THE COURT: Did he authorize you to come into this courtroom today and to speak on his behalf?

MS. KEYES: No, sir.

THE COURT: Well, are you authorized to ask for a continuance of this trial on his behalf?

MS. KEYES: Yes.

THE COURT: what did he tell you with respect to that?

I mean, I would be interested in knowing specifically what he said to you?

MS. KEYES: He specifically, he was unhappy that-- he was unhappy that we were unable to settle with the boatyard before the case came up. We were trying all along to settle.

THE COURT: I believe Mr. Reynolds has indicated that, that he had been engaging in or the parties had been engaging in serious settlement discussions?

MS. KEYES: Yes, sir.

Mr. Dolenz didn't mention anything to me about myself representing his interest in the boat. He was hoping for a continuance so that he could properly prepare it.

THE COURT: Mr. Perry, do you have any questions?

MR. PERRY: No, Your Honor, I don't.

THE COURT: Ms. Keyes, am I pronouncing the last name correctly?

MS. KEYES: Yes, sir.

THE COURT: Is Mr. Dolenz retaining Mr. Reynolds and his firm to defend him in this action?

MS. KEYES: No, he won't.

THE COURT: All right, thank you, Ms. Keyes.

All right, Mr. Perry, what does the Plaintiff say about all this?

MR. PERRY: Your Honor, I know Lyman fairly well and I don't think there is any plan in this to, on his behalf at all to delay the case.

I do believe that he is not representing the owner. He lacks any capacity to represent them in court. Ms. Keyes obviously no longer has standing before this Court. The only possible procedure that we could probably undertake would be a rule 56 motion here now or to present evidence by affidavit later.

I don't see the point in going through a half a day's worth of trial when, in essence, we are in a default position.

Now I agree with Lyman that the continuance probably would not hurt my client in terms of the value of the collateral here. But he has been waiting for over a year and a half to recover. That it continues to accrue wharfage charges, it continues to require additional work to prevent deteriorating and all those things do, in fact, prejudice my client.

I have asked him and he is not in favor of a continuance. I don't believe that it is appropriate at this time.

THE COURT: Let me take a very short recess and then I will advise whether we will go forward with this proceeding.

(Recess.)

THE COURT: All right, is it Ms. or Mrs. Keyes?

MS. KEYES: Miss.

THE COURT: Let me ask you to step to the podium one last time, please.

I want to confirm several things. You have represented to the Court this morning that you had assigned all of your right, title and interest to the vessel in question to a Mr.Dolenz.

What is his first name?

MS. KEYES: Bernard.

THE COURT: And you did that on March 15th, 1987.

MS. KEYES: Yes, sir.

THE COURT: You have also, and this is why I have got you up here again. I want to make sure I understand what you have said here in Court this morning.

It's the Court's understanding that Mr. Dolenz does not wish for Mr. Reynolds or his firm to represent Mr. Dolenz here in the proceeding; is that correct?

MS. KEYES: True.

THE COURT: And are you at this time discharging Mr. Reynolds and his firm from further representation of you in this proceeding?

Is there something mysterious about that question?

MS. KEYES: No, sir. I hadn't thought of it. But I guess so. Before the case even came up to docket he had told me that he was resigning himself.

THE COURT: My question still is do you wish for Mr. Reynolds and his firm to continue to represent you?

MS. KEYES: No, sir.

THE COURT: And I believe that you represented to the Court here this morning that you are not authorized by Mr. Dolenz to act as his agent for the purposes of this proceeding; are you?

MS. KEYES: True.

THE COURT: I need to ask you again, because your response to my question about a continuance was, it kind of moved around a little bit and I had some difficulty following it. But did you represent to the Court that Mr. Dolenz authorized you to move for a continuance of this trial?

MS. KEYES: No, we were hoping for a continuance. But we didn't discuss him authorizing me to speak for him.

THE COURT: Thank you very much. That is all.

This Court has its concerns with respect to the eleventh hour assignment that has been represented here in open court by Ms.

Keyes to have taken place between herself and Mr. Dolenz on March 15th, 1987.

However, the Court is not here to rule upon the validity of that assignment except the Court notes for the record the Court's concerns over the good faith actions of this eleventh hour assignment, that is the good faith action between Ms. Keyes and the alleged new owner of the vessel in question, Mr. Bernard Dolenz.

The Court is going to grant Mr. Reynold's motion to withdraw and the Court grants the motion of Lyman H. Reynolds, Jr., Esq., and the law firm of Roberts and Reynolds to withdraw as counsel of record for the Defendant in this action based in particular on the references set forth in the motion to withdraw docket entry number 19.

Mr. Reynolds if you would provide the Court with a proposed order to that effect. And the Court so orders that Mr. Reynolds and his law firm further are discharged from

further representation with respect to the Defendant vessel and with respect to Mrs. Melissa Keyes in this proceeding.

Just so the record is clear, if some reviewing Court has to take a look at this proceeding, assuming arguendo that anything that Ms. Keyes has said here in Court this morning could be construed to be a motion for continuance, the Court is going to deny that motion for continuance.

Once, again, the Court noting its concern for the good faith involved in the eleventh hour activities that have taken place in this matter between Ms. Keyes and Mr. Bernard Dolenz, the Court also notes for the record that there has been no written motion for continuance filed by Mr. Dolenz, the alleged new owner of the vessel, and it is the Court's opinion that Mr. Dolenz has had sufficient time, it now being ten minutes of 12:00 Eastern Standard Time that Mr. Dolenz had sufficient time to have made contact

with the Court's chambers and there has been no such contact and also that Mr. Dolenz has had time to express mail here to the Court any motion for continuance, if he, Mr. Dolenz, was desirous of such.

Ms. Keyes having represented to the Court that Mr. Dolenz is a lawyer, the Court assumes that Mr. Dolenz would be familiar with the customary practice in moving for a continuance as opposed to hoping that there might be a continuance.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORID

ADMIRALTY DIVISION

CASE NO. 86-8384-CIV-ZLOCH

STEWART YACHT BUILDERS, INC.,

Plaintiff

VS.

ARIES STAR TREK, enrollment #55798, together with all tackle and apparel

Defendant.

_____/

MOTION TO VACATE JUDGMENT
MOTION TO VACATE PLAINTIFF'S MOTION FOR AN AWARD OF COSTS &
MOTION FOR MODIFICATION OF THE ORDER APPOINTING SUBSTITUTE CUSTODIAN & ORDER

Defendant moves the Court to vacate and set aside the final Judgment entered against Defendant in this cause on February 16, 1988, and to grant leave to Defendant to defend itself through its owner, Bernard J. Dolenz, and to allow the filing of the counter-claim for damages against the Plaintiff or his

breach of bailment, on the grounds as more fully appears from the affidavit of Bernard J. Dolenz, attached as Exhibit "A", and the memorandum of law attached. Defendant also moves the Court to vacate and set aside its order granting the Motion for Modification of the Order Appointing Substitute Custodian and to Deny the Motion for an Award of Costs on the grounds as more fully appears from the affidavit of Bernard Dolenz, attached hereto as Exhibit "A" and the annexed Memorandum of Law.

Dated: 04/09/88

Respectfully submitted,

Bernard J. Dolenz, J.D., M.D.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been sent by regular mail to Steven Perry, P.O.

Drawer 24, Stuart, FL 33495-0024 on this 11th day of April, 1988.

_____.
Bernard J. Dolenz

AFFIDAVIT

State of Texas

County of Dallas

Bernard J. Dolenz, being duly sworn, deposes and says:

My name is Bernard J. Dolenz. I am over 21 years of age, have never been convicted of any felony, and am competent to make this statement.

I am the owner of the Defendant "vessel" Aries Star Trek, and the Claim of Bernard J. Dolenz was filed April 6, 1987 in this Court. While there was an oral agreement for an assignment of all the rights of the defendant "vessel" March 15, 1987, the written assignment was not received by me until on or about March 26, 1987 in Dallas, Texas. From the time of March 15 to when I received the written assignment, I viewed Melissa Keyes as having equitable title to the "vessel", and Mr. Lyman Reynolds was an

attorney representing the interests of the Aries Star Trek.

Mr. Reynolds tried to abandon Melissa Keyes when he heard that the Plaintiff's owner, Greg Burdick, was threatened and placed a "withdrawal" motion before the Court, which the Court denied, shortly before trial.

I learned that the Court denied Mr. Reynold's Motion For Continuance March 16, 1988 and that the case was going to trial. I tried to reach the Court several times that morning because I needed to explain, and wanted to explain to the Court that I did not have any writing reflecting my ownership interest, and that Mr. Reynolds should try his best to represent the Aires Star Trek. The Court refused to accept my several phone calls, or to even call me back. Furthermore, to this date I have never met the Judge involved in this case, and have been denied hearings

before this Court, even though requested.

Additionally, I had a phone call in for Mr. Reynolds, but he did not return my calls to explain that Melissa Keyes still had equitable title to the "vessel" as I had never received the assignment. Melissa Keyes says Mr. Reynolds abandoned her during the trial process. This placed the Defendant "vessel" in a default posture, which was suprising, since the Court would not allow a continuance.

Melissa Keyes is not an attorney, and could not be in a position to understand the legal impact of her attorney abandoning her at trial time.

The Plaintiff's attorney, Mr. Perry, indicated to the Court that "Ms. Keyes obviously no longer has standing before this Court" on P. 13 of the Trial Transcript. The Court on P. 17 of the Transcript states "...Mr. Dolenz had

sufficient time to have made contact with the Court's chambers and there has been no such contact..." This is not correct as I tried on several occasions to reach the Judge of this Court to obviate the very problems that has so much turmoil. Ms. Keyes represented to the Court that I was the owner. Even though there have been numerous papers filed with the Court reflecting my involvement with this case, and with Mr. Perry sending me copies of documents, I have been the Real party in interest and owner of the Defendant "vessel", and have filed my claim of ownership, which has never been controverted.

Mr. Perry has not sent me notices of his Motion for Modification of the Order Appointing Substitute Custodian and no one, including the Clerk, has ever sent me a copy of the Final Judgment filed February 16, 1988. I

learned about it from "Cathy" who informed me of same April 6, 1988.

During this entire case, as the owner of the "vessel" it is my contention that I have been deprived of due process as the Final Judgment allows for the sale of my "vessel" without my ever being able to defend it. This has deprived me of my property without due process of law, and seems abhorrent to any system of justice.

The owner has meritorious defense as the boat was never commissioned or finished, according to Ray Seese, Plaintiff's marine surveyor. Mr. Burdick said that the boat was only 70% complete, and is so quoted in a newspaper article which is attached. The return from the U.S. Marshall, following the arrest, also states that the "vessel" was not complete. The attached documents in support of these statements are true and correct copies.

The owner has a meritorious claim as neither Greg Burdick nor any representative of the Plaintiff had any documents in the Court's file to show compliance with the Court's order filed July 3, 1986 that "the Plaintiff shall file with the Court on a monthly basis a statement of condition of the vessel". When I visited with Mr. Burdick and saw the "vessel" for the second time, it had deteriorated under his care as the starboard side, facing the sun, had board warpage with cracks between the planks, which it did not have upon my first inspection. Mr. Burdick also said that he had not started the diesel engines, which need to be run every couple of weeks to keep the motor seals from deteriorating. In this regard, I believe that Mr. Burdick breached his bailment responsibilities as bailee, and custodian of the vessel, and that the

owner should be permitted to have a counter-claim for these damages.

The Plaintiff also exhibited misconduct by not sending documents, as they had done in the past, regarding the MOTION FOR AN AWARD OF COSTS filed March 4, 1988, and giving any notice of the final judgment. The Clerk of the Court at no time sent any notice to me of the final judgment.

Additionally, the owner contends that the judgment is void as this Court does not have jurisdiction over the "vessel" as it has never been finished or commissioned according to statements appended hereto given by Greg Burdick, the U.S. Marshall who arrested the vessel, and marine surveyor Ray Seese.

Bernard Dolenz, as owner, was unable to defend the Defendant due to forcible obstacles from the Court as it would not grant a hearing, even though requested, and would not return the

phone calls on March 16, 1987 to Bernard Dolenz, when the Court allowed Melissa Keyes to be without counsel, would not continue the case, and placed the defendant vessel in a default posture.

It is the owner's contention that the Court should allow, under these circumstances, the vacation of the judgment in the furtherance of justice, as the Judgment is manifestly unjust. the vacation of the Judgment should be allowable, pursuant to Rule 60 (b)(1)(3)(4)(6).

_____

Bernard J. Dolenz

Subscribed to and sworn to before me on this 9th day of April, 1988.

_____

Brenda J. Dolenz

Notary Public in and for

The State of Texas

MEMORANDUM OF LAW

ISSUE OF ASSIGNMENT

On March 16, 1987, when the Court forced the case to trial and allowed Lyman Reynolds to withdraw, the transfer of title from Melissa Keyes to Bernard J. Dolenz, pursuant to assignment, had not taken place because delivery of the assignment did not occur until on or about March 26, 1987. The delivery was made in Dallas, Texas.

"Where the assignment is by a written instrument, simply signing or acknowledging the instrument is not sufficient to transfer the property, and delivery of the instrument is necessary to complete the assignment". Heyman v. Kline, D.C. Conn., 344 F. Supp. 1088, affirmed in part and reversed in part on other grounds, C.A., 456 F.2d 123, certiorari denied 93 S.Ct. 53, 409 U.S. 847, 34 L. Ed. 2d 88.

"As a general rule, in every transfer of title from one person to another, there must be an actual or constructive delivery of the thing, or paper title thereto, with intention to

pass title, and an actual or constructive acceptance, so as to end dominion on the one side an create it on the other'. 6 Am Jur 2d, 274, Section 91 dealing with Delivery.

The general rule is that in order to make an assignment effective, there must be in addition to a delivery of the thing assigned, an actual or constructive acceptance thereof by the assignee". 6 Am Jur 2d, 276, Section 93 dealing with Acceptance by assignee.

Texas law should apply to the assignment inasmuch as delivery was made in Texas.

OWNERSHIP OF DEFENDANT VESSEL

When Bernard Dolenz received the assignment in Texas, on or about March 26, 1987, title then passed to him and he should be able to sue in his capacity as the owner, or defend in his capacity as the owner.

"An assignee may sue in his own name and even for future interests. A right or interest to be assignable at common law, must have either an actual or potential existence. A thing has potential existence if it may actually exist at some future time". 7 Tex. Jur 3rd 186-187.

PROPERTY SUBJECT TO JURISDICTION

The Defendant vessel was never launched, but even if she was, she was not sufficiently advanced, she was not yet sufficiently advanced to discharge the functions for which she was designed, and the Melissa Keyes contract was to make changes in the original design, and have materials and labor furnished to that effect. Therefore, this Defendant vessel should not have been sued in Admiralty.

"...a vessel in the process of construction will become a vessel in terms of Admiralty jurisdiction only after its launching". 2 Am Jur 2d 73, Section 30 dealing with Admiralty.

"Even after the vessel was launched while she is not yet sufficiently advanced to discharge the functions for which she is designed, the materials, work and labor for her completion are not the subject matter of admiralty

jurisdiction". Thames Towboat Co. v. The Francis McDonald, (1920) 254 U.S. 242, 65 L.ed. 245, 41 sup. Ct. Rep. 65.

Supplying materials for construction of a vessel is not a maritime contract. People's Ferry Co. v. Beers, (1857) 61 U.S. (20 How.) 393, 15 L.ed, 961.

"A vessel is deemed to be still in the process of construction if it is not yet completed for the intended purpose, though it may have been launched". 2 Am Jur 2d, 756, Section 65 dealing with construction of vessels.

Proceedings in rem allow the owner to defend it against claims.

"Although technically, in a proceeding in rem, the res, not its owner, is the party defendant, such a proceeding nevertheless incidentally affects the persons interested in the, res, and they are entitled to defend it against the claim. Accordingly, it has been said that in a proceeding in rem, by virtue of dominion over the thing, persons interested in it are deemed to be parties to the suit". 2 Am Jur 2d 807, Section 144 dealing with Proceedings in rem.

THE MOTION FOR AN AWARD OF COSTS BY PLAINTIFF IS INAPPROPRIATE

The defendant failed to send notice regarding the Motion, and even if he had, he waived his claim to it, as the plaintiff, in accepting the appointment as a substitute custodian for the vessel, accepted the condition under 2a of the Court Order, filed July 3, 1986 that the "Plaintiff shall not be entitled to charge for storage as substitute custodian". Also, in the same order, under 2, the Plaintiff was obliged to file with the Court on a monthly basis a statement of condition of the vessel. No such instruments are shown to be filed in the Court record. By waiver and laches, and acceptance of the condition to be a substitute custodian, the Plaintiff should not be awarded costs.

"It must especially determine whether there has been inexcusable delay on the part of the one seeking the remedy and whether substantial prejudices may result to the opposite party, although if the libel shows on its face that it may be barred by laches

because of undue delay in instituting it, prejudice to the respondent is presumed until the contrary is made to appear". 2 Am Jur 2d, 834, Section 190 dealing with Laches.

RAISING LACK OF JURISDICTION

"Jurisdictional objections may be raised at any stage of the proceeding before final adjudication, and may be raised for the first time on appeal". 2 Am Jur 2d, 842, Section 202.

The record is repleat with cases showing that the Court lacks jurisdiction because the boat has not been finished, and the cites will not be repeated.

DUE PROCESS NOT ALLOWED

TO BERNARD DOLENZ

Bernard Dolenz, as owner, has been deprived of due process, as he has not had a hearing or been given an opportunity to defend the vessel, even if the Court had jurisdiction.

"One incident of constitutional protection against state deprivation of a property interest is that, at some point, notice and a hearing appropriate to the particular circumstances must be afforded". Collins v. Wolfson, 498, F2d 1100.

"Opportunity for a hearing required by due process must be given before the deprivation of a properly interest except for extraordinary situations where some valid governmental interest is at stake which justifies postponing the hearing until after the event". U.S.C.S. Const. Amend. 14, Burnley v. Thompson, 524 F2d 1233.

"Right to a hearing embraces an adequate opportunity to defend". Christhilf v. Annapolis Emergency Hospital Ass'n, Inc. 496 F2d 174, appeal after remand 552 F2d 1070.

MOTION TO VACATE JUDGMENT

SHOULD BE ALLOWED

The Courts should and do give a liberal construction to 60(b). Klapprott v. United States (1949) 335 US 601, 609, 69 S.Ct. 384, 387, 93 L ed 266. Each order or judgment shall be noticed by the clerk upon each party. Rule 77(d). Here the Final Judgment and the Order allowing the Motion For Modification of the Order Appointing Substitue Custodian were not sent to the owner, Bernard J. Dolenz. Also the Plaintiff did not send its Motion for

Modification of the Order Appointing Substitute Custodian or its Motion For Award of Costs, and there is no Certificate of Service to the owner, Bernard Dolenz, as is required.

Therefore, all these should be voided.

The owner, since he did not receive notice, did not have the opportunity to defend the claims against the defendant "vessel", has a meritorious defense, and has not received notices from the clerk regarding the final judgment or copies of the motions from the Plaintiff, rule 61(b)(1) comes into play because of mistake, inadvertence, surprise, or "excusable neglect". Foley v. United States, 645 F.2d 155 (2d Circuit - 1981). United Coin Meter Co. v. Seaboard Coastline R.R., 705 F 2d 839 (6th Circuit - 1983); Davis v. Musler, 713 F2d 907 (2d Circuit - 1983).

Lyman Reynolds was hired to defend the vessel by Melissa Keyes, and should not have been allowed to abandon defending the vessel, certainly while Melissa Keyes had equitable title. Dolenz was led to believe that Lyman Reynolds would defend the vessel until such time as he received the assignment to pass title. From a default judgment where individual defendant erroneously believed corporate defendant's counsel would represent him, relief was granted in Tickerton v. Record Museu, Inc., 92 F.R.D. 6 (E.D. Pa. 1981).

Rule 60(b)(3) comes into play because of the misconduct of the Plaintiff, wherein several motions have not been sent the real party in interest, the owner Bernard Dolenz as required. This deliberate withholding of relevant documents has prevented the owner from fully and fairly presenting his defense. See U.S. v. Undetermined

Quantity, 583 F2d 942 (7th Cir. 1978) and Wilkin v. Sunbeam Corp., 466 F2d 614 (10th Cir. 1972).

Rule 60(b)(4) comes into play as a party is allowed relief from a void judgment because of lack of jurisdiction. Such a judgment is legally ineffective, or as sometimes stated, a nullity. Willams v. North Carolina 325 U.S. 226 (1945); Kalb v. Feurestein, 308 U.S. 433 (1940); Jordon v. Gilligan, 50 F2d 701 (6th Cir. 1974), cert. denied, 241 U.S. 991 (1975).

"Traditionally, a void judgment could be set aside at any time." See 1 Freeman, JUDGMENTS, Section 322. Today, because they are viewed as a legal nullities from their inception, void judgments may still be vacated at any time by the courts which rendered them. See Misco Leasing, Inc. v. Vaughn, 450 F2d 257 (10th Cir. 1971) where a default judgment entered without personal

jurisdiction vacated after a period of over two years; and Crosby v. Bradstreet Co., 312 F2d 483 (2nd Cir. 1963) where relief from an invalid injunction granted after 29 years.

Rule 60(b)(6) liberally applies to situations not covered by the other 5 clauses. The district court has power to grant relief from a judgment whenever, under all the surrounding circumstances, such action is appropriate in the furtherance of justice. See Good Luck Nursing Home Inc. v. Harris, 636 F2d 572 (D.C. Cir. 1980).

The Court should allow Dolenz as owner an opportunity to defend the vessel, as the Court has evidence of his ownership because of statements given by Melissa Keyes in the Trial Transcript that all rights to the vessel were granted to Bernard Dolenz; Dolenz had his statement of claim before the Court

April 6, 1987; and the assignment from Melissa Keyes to Bernard Dolenz delivered on or about March 26, in Dallas, Texas to Bernard Dolenz. What further proof or notice could the Plaintiff or the Court require?

Accordingly, Bernard Dolenz requests that the judgment be vacated and that he be allowed to defend the vessel in the interest of justice.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.,
a Florida corporation,

Plaintiff,

vs. ORDER

ARIES STARTREK, ENROLLMENT
NO. 555798, TOGETHER WITH
ALL TACKLE AND APPAREL,

Defendant.
_____/

THIS MATTER is before the Court upon the Motion To Substitute Parties (DE 53) and the Motion to Extend Time to Appeal (DE 54) filed herein by Mr. Bernard J. Dolenz.

This Court further notes that Mr. Bernard J. Dolenz has filed a Notice Of Appeal, appealing the Final Judgment (DE 51) previously entered herin. Although this Court may not have jurisdiction over the Motions aforementioned, for the benefit of the reviewing court, this Court will

consider and rule upon the Motions aforementioned.

This Court notes the inconsistencies in the statements of Mr. Bernard J. Dolenz which have plagued this case. For example, the Court notes that in Mr. Dolenz's Motion to Substitute Parties (DE 53), Mr. Dolenz states in Paragraph No. 2 that Melissa Keyes assigned her ownership interest in the Defendant vessel to Mr. Dolenz as of March 15, 1987, said assignment being received in Dallas, Texas. Mr. Dolenz then turns right around and in an Affidavit attached to his Motion to Extend Time to Appeal (DE 54), he states that there was an oral agreement for an assignment of all of the rights of the Defendant vessel March 15, 1987, the written assignment not being received by Mr. Dolenz until on or about March 26, 1987 in Dallas, Texas. In his Affidavit, Mr. Dolenz goes on to express the view that Melissa Keyes had

"equitable title" to the vessel at the time of the final hearing on March 16, 1987.

In a Motion For Sanctions (DE 35) filed by Mr. Dolenz, Mr. Dolenz states in Paragraph No. 1 of that Motion that Melissa Keyes transferred her interest in the vessel through her agent on March 14, 1987 in Dallas, Texas. The Court further notes that in a Motion To Dismiss (DE 28) filed by Mr. Dolenz, he states on Page 2 of that Motion that Melissa Keyes had equitable title to the Defendant vessel March 16, 1987 as the assignment to Bernard Dolenz had not been delivered to him or his attorney.

The Court in its Final Judgment did not make any determination of the validity of the alleged asignment from Melissa Keyes to Bernard Dolenz. However, the Court points out that the action in this case is an action in rem to enforce a maritime lien. The Defendant in the case is the vessel, Aries Startrek, not Melissa Keyes.

Therefore, any assignment of interest in the vessel had no effect on the initial in rem action against the Defendant vessel. The vessel at all times material has been in the Southern District of Florida and the Court has never lost in rem jurisdiction of the Defendant vessel.

The court file and the record clearly reflect the actions that have been engaged in by Melissa Keyes and Bernard Dolenz with respect to this proceeding. This Court is concerned with the good faith on the part of Melissa Keyes and/or Bernard Dolenz with respect to the forward progress of a case to final hearing. The above-styled cause was originally noticed for Calendar Call for February 20, 1987 by Order (DE 16) dated February 3, 1987. The Minutes (DE 18) from the Calendar Call reflect both sides as "ready" for trial. The Final Hearing commenced on March 16, 1987. Therefore, there was plenty of advance notice given to

the parties with respect to the Final Hearing.

If parties are allowed to engage in such "surprise tactics" as the maneuvers seen in this proceeding by Ms. Keyes and Mr. Dolenz, then it is conceivable that a case would never get to Final Hearing.

This Court has carefully considered the merits of the Motion to Substitute Parties (DE 53) and Motion To Extend Time To Appeal (DE 54). The Court finds no excusable neglect as a basis to extend the time to appeal.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED that the Motion to Substitute Parties (DE 53) and the Motion to Extend Time to Appeal (DE 54) be and the same are hereby DENIED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 22nd day of April, 1988.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

Counsel of Record and Individuals
on attached mailing list.

STUART YACHT BUILDERS, INC. v. ARIES STARTREK, Etc., CASE NO. 86-8384-CIV-ZLOCH

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Bernard J. Dolenz
6102 Swiss Avenue
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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 88-5360

STUART YACHT BUILDERS, INC.,

Plaintiff/Appellee,

V.

ARIES STARTREK, Enrollment No. 555798 together with all tackle and apparel,

Defendant/Appellant.

MOTION FOR RE-HEARING

Bernard J. Dolenz, as owner of the Aries StarTrek, makes this Motion for Re-Hearing regarding the opinion rendered August 11, 1988, and pursuant to FRAP 40, would show the Court that it has overlooked or misapprehended the following points:-

1. THE APPEALS COURT ERRED IN NOT EXAMINING AND DECIDING THE

JURISDICTIONAL ISSUE OF WHETHER OR NOT THE TRIAL COURT HAD JURISDICTION.

The issue of appropriate jurisdiction has been raised at the Trial Court, and in a Mandamus action before this Court, which have not been addressed.

Lack of jurisdiction may be raised at any time, even upon a second appeal of an action in which the point was never raised in the Trial Court, and was not advanced in a previous appeal (flota Maritima Browning de Cuba, Sociadad Anonima v. Snobl (1966, CA4 Md) 363 F2d 733, cert den 385 US 837, 17 L Ed 2d 71, 87 S Ct 82), and when raised must be examined and decided (Armstrong Cork Co. v. Farrell Line, Inc. (1948, DC Pa) 81 F Supp 848).

The Court has before it Exhibit "A", which shows three (3) distinct documents showing that the vessel is incomplete, under construction, and empty of equipment, (US Marshall's arrest

statement of 07/10/86); statement of Marine Surveyor that the vessel had never been completely finished or commissioned; and the Plaintiff's owner, who is quoted in newspaper articles that the boat is about 70% complete.

From these statements, it should be apparent to this Court that there was never the underpining for a Maritime Contract, and that this case had no business being at the Trial Court level, and should have been dismissed for lack of jurisdiction.

For over 100 years, supply materials for construction of a vessel is not a Maritime contract. People's Ferry Co. v. Beers, (1857) 61 US (20 How.) 393, 15 L Ed, 961.

"Even after the vessel was launched, while she is not yet sufficiently advanced to discharge the functions for which she is designed, the materials, work, and labor for her completion are

not the subject-matter of admiralty jurisdiction". Thames Towboat Co. v. The Francis McDonald, (1920) 254 US 242, 65 L Ed 245, 41 Sup Ct. Rep. 65.

2. THE APPEALS COURT ERRED IN HOLDING THAT THE NOTICE OF THE APPEAL WAS UNTIMELY AS THERE WERE CIRCUMSTANCES THAT PREVENTED THE TIMELY APPEAL UNDER THE CIRCUMSTANCES.

While the Clerk did not send notice of the judgment to the owner, Bernard J. Dolenz, per FRCP 77(d), Bernard J. Dolenz complied with the efforts outlined in Tessmer v. Walker, 833 F2d 934 (11th Cir. Dec. 1987), and it was an abuse of discretion at the Trial Court to deny his Motion for an Extension of Time to Appeal.

In this regard, Bernard J. Dolenz made repeated inquiries by phone, as well as a couple of visits to review the file, requesting repeatedly of Judge Zloch's clerks and staff to expedite the Motions

before the Court and to keep Bernard J. Dolenz posted. These inquiries were made repeatedly of the Clerk as well as Judge Zloch's secretary. Because of the multiple calls to Ms. Greenberg, she indicated that the Clerk's office would keep me informed.

I was unable to have even a hearing before Judge Zloch even in spite of a Motion For Hearing, even though the Court file reflects that I was the owner of the vessel. I never saw the Judge, and even though repeated requests were made by Motion, he would not grant a hearing, and seemingly conducted this case like a "Star Chamber proceeding", which was obviated in 1215 by the signing of the Magna Carta, which principles of due process have been adopted in Amendments 5 and 14 of the U.S. Constitution.

Bernard J. Dolenz believes that he did everything reasonable under the

circumstances to be kept informed short of groveling and living at the Ft. Lauderdale Federal Courthouse. Bernard J. Dolenz asks of this Court what else he could have done under the circumstances.

Rodgers v. Watt, 722 Fd2 456, (9th Cir. 1983), holds that Rule 60(b) should be liberally construed, and that the provisions of the Rule must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments and the "incessant command of the Court's conscience that justice be done in light of ALL the facts". Banker's Mortgage Co. v. United States, 428 F 2d 73, 77 (5th Cir.), cert. denied, 399 U.S. 927, 90 S. Ct. 2242, 26 L. Ed. 2d 783 (1970) (emphasis in original).

This Court should consider ALL the facts and in particular, consideration that the Trial Court had no business with

this case in the first place as it lacked jurisdiction, and also because the Trial Court would not even consider the rights of the owner, Bernard J. Dolenz, to the vessel, and would not grant a hearing for its defense, violating due process considerations.

In this regard, "Opportunity for a hearing required by due process must be given before the deprivation of a property interest except for extraordinary situations where some valid governmental interest is at stake which justifies postponing the hearing until after the event". U.S.C.S. Const. Amend. 14, Burnley v. Thompson, 524 F2d 1233.

"Right to a hearing embraces an adequate opportunity to defend". Christhilf v. Annapolis Emergency Hospital Ass'n, Inc. 496 F2d 174, appeal after remand 552 F2d 1070.

3. THE APPEALS COURT ERRED AS IT HAS JURISDICTION EVEN THOUGH THE TRIAL COURT DENIED THE MOTION FOR EXTENSION TO APPEAL.

THE TRIAL COURT ABUSED ITS DISCRETION BY NOT EXTENDING THE TIME TO APPEAL UPON APPELLANT'S MOTION.

The Motion To Extend Time for Appeal occurred before 60 days transpired, and Dolenz contends that he complied with Rule 60(b) by demonstrating that excusable neglect by reliance upon the Clerk's assurance of keeping Dolenz posted following many phone calls, and because of the Plaintiff's misconduct in not sending copies of his several Motions to the owner, Bernard J. Dolenz, which prevented the owner from being fully informed about those Motions, and prepare for responses. Clause 4 of Rule 60(b) allows relief from a void judgment, and the judgment should be considered a nullity as the Court did

not have jurisdiction over this unfinished and non-commissioned vessel. Dolenz contends that he had complied with the elements given in Walker, supra, and GRIFFIN V. SWIM-TECH CORP., 722 F2d 677, 680 (11th Cir. 1984).

In THOMPSON V. KERR-McGEE REFINING CORP., 660 F2d 1380 (10th Cir. 1981), cert denied, 455 U.S. 1019, 102 S. Ct. 1716, 72 Led 2d 137 demonstrated that excusable neglect by reliance on an attorney's statement for relief was acceptable. Here there was reliance upon Mrs. Goldberg's assurance that she would keep me posted following many telephone calls to her.

4. THE APPEALS COURT ERRED AS IT HAD JURISDICTION PURSUANT TO 28 USC SECTION 1655.

This statute provides that, in in rem actions, any defendant not actually personally served with an order of the Court may at any time within one year

after final judgment enter his appearance and the Court is required to make an order setting aside the judgment and permitting the defendant to plead and defend, on payment of such costs as the Court may deem just.

PRAYER

The Appellant prays that this Court answer each of the re-hearing points, and that this Court dismiss the case at the trial level as it lacks jurisdiction over the subject matter, that alternatively, this Court reinstate its jurisdiction over the case as the appeal to this Court was timely made under the circumstances, and for general relief.

Respectfully Submitted,

Bernard J. Dolenz

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument was mailed by

regular mail on this the 23rd day of August, 1988 to Steven Perry, P.O. Drawer 24, Stuart, FL 33497-0024.

_____

Bernard J. Dolenz

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-5360

(FILED SEPTEMBER 29, 1988)

STUART YACHT BUILDERS, INC.
A Florida Corporation,
Plaintiff/Appellee,
V.
ARIES STARTREK, Enrollment
No. 555798,
together with all tackel and
apparel,
Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
FLORIDA

ON PETITION(S) FOR REHEARING
(September 29, 1988)

BEFORE: RONEY, Chief Judge, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM: The petition(s) for rehearing filed by Appellant, Bernard Dolenz, is DENIED.

ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE